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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 114.

JAMES H. DE VAUGHN AND EMILY DE VAUGHN, HIS WIFE; MARY R. PORTER AND JAMES B. PORTER, HER HUSBAND; GEORGE E. KIRK, ET AL., APPELLANTS,

vs.

SARAH W. HUTCHINSON AND JOHN B. HUTCHINSON, HER HUSBAND; BENJAMIN D. V. MITCHELL AND RICHARD G. MITCHELL.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

FILED JUNE 13, 1894.

(15,603.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., OCTOBER 12, 1896.

1 In the Supreme Court of the District of Columbia.

JAMES H. DE VAUGHN, EMILY DE VAUGHN, and REBECCA J. KIRK, Complainants,
vs.
WILLIAM H. DE VAUGHN, SAMUEL P. DE Vaughn, Elizabeth De Vaughn, Catharine Spalding, George Spalding, Sarah Stanley, Elizabeth Kelly, William Kelly, Charles Beach, Carrie L. Beach, Sarah E. Bean, William H. Bean, Martha E. Hughes, George A. R. Hughes, Fannie Sullivan, Elizabeth M. Dillon, Melvin N. Dillon, Louis L. Beach, Emma C. Beach, Caroline S. De Vaughn, Martha E. De Vaughn, Thomas H. De Vaughn, George E. Kirk, John H. De Vaughn, Alice E. De Vaughn, Edgar N. De Vaughn, Charles J. De Vaughn, Amanda E. Watkins, George W. Watkins, Mary A. Robey, Andrew V. B. Robey, Addison De Vaughn, Mary R. Porter, Margaret De Vaughn, James B. Porter, Jane Davis, Elijah Davis, Alice Crown, Winfield Crown, Fillmore Harrison, Harriet W. Harrison, Walter D. Harrison, George W. Harrison, Ida Harrison, Benjamin D. Mitchell, Jennie Mitchell, Richard R. Mitchell, Sarah W. Hutchinson, John B. Hutchinson, Defendants.

No. 13602. Equity.

2 To the supreme court of the District of Columbia, holding an equity court for said District:

The complainants by leave of the court first had and obtained file this their amended and supplemental bill and thereby complain and show unto the court as follows:

1. That the complainants James H. De Vaughn and Emily De Vaughn, his wife (the latter by an error being designated as "A. C. De Vaughn" in the original bill herein) are citizens of the United States and residents of the city of Alexandria and State of Virginia; that the complainant Rebecca J. Kirk is a citizen of the United States and a resident of the District of Columbia; and the said James H. De Vaughn brings this suit in his own right and as heir-at-law as hereinafter shown and complainant Emily De Vaughn sues as the wife of the said James H. De Vaughn; the said Rebecca J. Kirk is the wife of the defendant George E. Kirk and brings this suit in her own right and as heir-at-law and in reference to her sole and separate estate as hereinafter shown.

2. That the defendants Sarah Stanley, Sarah E. Bean and Wm. H. Bean, her husband, Martha E. Hughes and George A. R. Hughes, her husband, Caroline S. De Vaughn, George E. Kirk,

Amanda E. Watkins, and George W. Watkins, her husband, Mary A. Robey and Andrew V. B. Robey, her husband, Addison De Vaughn and Margaret De Vaughn, his wife, Mary R. Porter and James B. Porter, her husband, Fillmore Harrison and Harriet W. Harrison, his wife, Walter D. Harrison, George W. Harrison and Ida Harrison, his wife, Sarah W. Hutchinson and John B. Hutchinson, her husband, are, as the complainants are informed and believe and so charge, residents of the District of Columbia; that the defendants William H. De Vaughn, Samuel P. De Vaughn and Elizabeth De Vaughn, his wife, Alice E. De Vaughn and Edgar N. De Vaughn are residents of the city of Alexandria and State of Virginia; that the defendants Catharine Spalding and George Spalding, her husband, are residents of Berryville, Clark county and State of Virginia; that the defendants Elizabeth Kelly and William Kelly, her husband, are, as complainants are informed and believe and so charge, residents of Beltsville, Prince George
3 county and State of Maryland; that the defendant John H. De Vaughn as complainants are informed and believe and so aver, is a resident of the State of North Carolina; that the defendant Alice Crown and Winfield Crown are residents of Burke Station, Fairfax Co., and State of Virginia; that the defendants Benjamin D. Mitchell and Jennie Mitchell his wife, and the defendant Richard R. Mitchell are residents of Annapolis and State of Maryland; that the defendants Jane Davis and Elijah Davis are residents of St. Mary's county and State of Maryland; that the defendant Fannie Sullivan is a resident of Staten island, New York; that the defendants Elizabeth M. Dillon and Melvin N. Dillon, her husband, and Thomas De Vaughn are residents of Normal, Illinois; that the defendant Louis L. Beach and Emma C. Beach his wife, are residents of Jacksonville, Florida; that the defendant Charles Beach and Carrie L. Beach his wife are residents of Hyattsville, Maryland; and that the defendants Charles J. De Vaughn and Martha E. De Vaughn his wife, are residents of Prince George county, Maryland.

3. That the said defendants William H. De Vaughn, Samuel P. De Vaughn, Catharine Spalding, Sarah Stanley, Elizabeth Kelly, Charles Beach, Sarah E. Bean, Louis L. Beach, Martha E. Hughes, Fannie Sullivan, Caroline S. De Vaughn, Charles J. De Vaughn, Thomas H. De Vaughn and Elizabeth M. Dillon are the descendants and only heirs-at-law of John De Vaughn, deceased, who was a brother of said Samuel De Vaughn, deceased, the testator hereinafter mentioned; said John De Vaughn having departed this life, to wit, the — day of ——, 186–, in-
4 testate; that the complainants, James H. De Vaughn and Rebecca J. Kirk, and the defendants Alice E. De Vaughn, Edgar N. De Vaughn, Amanda E. Watkins, Mary A. Robey and Addison De Vaughn are the descendants and only heirs-at-law of William De Vaughn, deceased, also a brother of said Samuel De Vaughn, deceased, the testator hereinafter mentioned, the said William De Vaughn having departed this life before said testator, to wit, the — day of ——, 186–, intestate; and the said descendants

and heirs-at-law of said John De Vaughn and William De Vaughn both deceased, are also heirs-at-law of said Samuel De Vaughn, deceased, the testator hereinafter mentioned, and as such heirs-at-law, are sued herein, as well as in their own right; that the defendants Mary R. Porter, Jane Davis, Alice Crown, Fillmore Harrison, Walter D. Harrison, George W. Harrison, Benjamin D. Mitchell, Richard R. Mitchell and Sarah W. Hutchinson are the de-cendants, and only heirs-at-law of Susan Brayfield deceased, a sister of the said Samuel De Vaughn deceased, the testator hereinafter mentioned; the said Susan Brayfield having departed this life intestate, in the city of Washington, and District of Columbia, to wit, the 3rd day of December, 1891; and the said descendants and heirs-at-law of said Susan Brayfield, deceased, are sued herein in their own right and as such heirs-at law, the said Mary R. Porter being also sued as the grantee in a certain deed of conveyance as hereinafter shown; the defendants Benjamin D. Mitchell, Richard R. Mitchell and Sarah W. Hutchinson are also sued as the children and only surviving
5 heirs begotten of the body and the only heirs-at-law of Martha Ann Mitchell, deceased, a daughter of said Susan Brayfield, deceased, and a devisee named in the last will and testament of said Samuel De Vaughn, deceased; that the defendants Alice Crown, Fillmore Harrison, Walter D. Harrison, and George W. Harrison are the children and only heirs-at-law of Catharine Sophia Harrison, deceased, a daughter of said Susan Brayfield, deceased; that the defendant Elizabeth De Vaughn is sued as the wife of said Samuel P. De Vaughn, said George Spalding, as the husband of Catharine Spalding, said William Kelly as the husband of Elizabeth Kelly; said William H. Bean as the husband of said Sarah E. Bean; said Melvin N. Dillon as the husband of said Elizabeth M. Dillon (whose name was formerly Elizabeth Mallen De Vaughn); said Emma C. Beach as the wife of said Louis L. Beach; said George A. R. Hughes as the husband of said Martha E. Hughes; the said Carrie L. Beach as the wife of Charles Beach; said Martha E. De Vaughn as the wife of said Charles J. De Vaughn; said Margaret De Vaughn as the wife of Addison De Vaughn; said George E. Kirk as the husband of the complainant Rebecca J. Kirk; said John H. De Vaughn as the husband of Emma R. De Vaughn, deceased; said George W. Watkins as the husband of said Amanda E. Watkins (formerly Amanda E. De Vaughn); said Andrew V. B. Robey as the husband of the said Mary A. Robey; said James B. Porter as the husband of the said Mary R. Porter; said Elijah Davis as the husband of the said Jane Davis; said Winfield Crown as the husband of the said Alice Crown; said Harriet W. Harrison as the wife of
6 the said Fillmore Harrison; the said Ida Harrison as the wife of the said George W. Harrison; the said Jennie Mitchell as the wife of the said Benjamin D. Mitchell, and the said John B. Hutchinson as the husband of the said Sarah W. Hutchinson; and all the defendants to this suit are adults.

4. That the defendants, Caroline S. De Vaughn, Thomas H. De Vaughn, Fannie Sullivan, Alice E. De Vaughn, Edgar N. De Vaughn, Walter D. Harrison, and Richard R. Mitchell are unmar-

ried as complainants are informed and believe and so charge; that the defendant Sarah Stanley is the widow of John Stanley, deceased; and that the said John H. De Vaughn is a widower the husband of Emma R. De Vaughn, deceased.

5. That heretofore, to wit, the 5th day of July 1867, Samuel De Vaughn late of the District of Columbia, departed this life therein, leaving his last will and testament bearing date the 20th day of April, 1861, and the same, on or about the first day of September, 1867, was duly admitted to probate and record in the orphans' court of the said District, in Will Book No. 11, folio 7, *et seq.*, in the office of the register of wills of the District of Columbia, a duly certified copy of said last will and testament being herewith filed marked "Will," and prayed to be taken and considered as part of this bill of complaint.

6. That said testator left surviving him as his heirs-at-law, his sister Susan Brayfield, since deceased, and a brother, John De Vaughn since deceased, and the heirs-at-law of another
7 brother William De Vaughn, deceased, who died before said testator and after the execution of said last will and testament; and said Susan, John and William are named as devisees in said last will and testament of said testator; that the said heirs-at-law of said John De Vaughn and the said heirs-at-law of said William De Vaughn deceased, and the defendant Mary R. Porter as the grantee of the said Susan Brayfield, deceased, represent, as complainants are informed and believe and so charge, all the persons who are beneficially interested in the real estate hereinafter specifically described and passing to them by virtue of a lapsed devise in the said last will and testament of said testator.

7. That *inter alia* the said testator in and by his said last will and testament devised as follows:

"Item. I give and devise unto my sister Susan Brayfield the whole of square four hundred and eighty-three and improvements also, lots twenty, twenty-one and part of lot twenty-two in square three hundred and seventy-eight, situated in the city of Washington, during her natural life, and at her death to her daughters Mary Rebecca Brayfield, Catharine Sophia Harrison, and Martha Ann Mitchell to be divided in the following manner that is to say: Martha Ann shall have one-half of lot twenty, as subdivided, being seventy-three feet deep, having on the same two houses, to Catharine Sophia the other half, (being the east half) of said lot twenty having also on the same two houses, and Mary Rebecca shall have the corner store situated on lot twenty-one, Catharine Sophia shall have the two houses next south of the said corner store on said lot twenty-one, and Martha Ann shall have the next two houses south of the two to Catharine Sophia, and adjoining the same on said lot twenty-one, and Mary Rebecca shall have the whole of that part of
8 lot twenty-two as subdivided from lot twenty and improvements during their natural lives, and after their death to their heirs begotten of their bodies, and to their heirs and assigns forever,—

"I do desire that square four hundred and eighty-three shall be

subdivided at the death of my sister Susan Brayfield and distributed as follows: Mary Rebecca Brayfield shall have the whole front on K street, ninety feet deep to a ten-foot alley, which comprises lots one and two, with all improvements on the same, Martha Ann Mitchell shall have ninety feet on Sixth street, running that breadth through the square to Fifth street, and Catharine Sophia Harrison shall have the remainder north portion of said square four hundred and eighty-three during their natural lives, and at their death to be equally divided among the heirs of their bodies begotten, share and share alike, and to their heirs and assigns forever." * * *

"Item. I give and devise to Martha Ann Mitchell, daughter of Susan Brayfield the west part of lot eighteen, in square three hundred and seventy-eight and all improvements, including that part as subdivided in the rear on said square, and to her heirs and assigns forever." * * *

8. That the said life tenant Susan Brayfield departed this life intestate in the said District of Columbia, to wit, the 3d day of December, 1891, as aforesaid, having previously in her lifetime executed and delivered to her daughter Mary R. Porter, a certain deed bearing date the 7th day of June, 1878, and recorded the same day among the land records of the District of Columbia in Liber No. 891, folio 14 *et seq.*, purporting to convey in fee-simple to the said Mary R. Porter all and singular the interest and estate in certain pieces, parcels, or lots of ground in the city of Washington
9 and said District of Columbia devised to the said Susan Brayfield under and by virtue of the said last will and testament of the said testator, and also all the right, title and estate of any kind and description which the said Susan Brayfield may have or be in any way entitled to as one of the devisees or heirs-at-law of the said testator, which said deed the complainants pray may be read and considered as part hereof.

9. That the mother of said testator, Annie De Vaughn departed this life before said testator in said District, to wit, the — day of ——, 1863; and all the debts of said testator have long since been paid and his personal estate settled.

10. That the said Martha Ann Mitchell, a daughter of the said Susan Brayfield, deceased, departed this life intestate on or about the — day of ——, 1866, after the execution of said last will and testament and before the death of said testator, leaving as the surviving heirs begotten of her body and her only surviving children and heirs-at-law, the defendants Benjamin D. Mitchell, Richard R. Mitchell and Sarah W. Hutchinson; and the said defendants Alice Crown, Fillmore Harrison, Walter D. Harrison and George W. Harrison are the only surviving heirs begotten of the body and the children and only heirs-at-law of Catharine Sophia Harrison, deceased, a devisee named in said will, who departed this life to wit, the — day of ——, 1884, in the said District, intestate.

11. The complainants aver that by reason of the death of the said Martha Ann Mitchell before the death of said testator as afore-

said all the devises to her in said last will and testament in
10 remainder, in tail or in fee, lapsed, and as the supreme court of said District of Columbia sitting in general term, in cause No. 1164 equity so held with reference to the said devise in said will to said Martha Ann Mitchell of the said west part of lot eighteen (18) in square three hundred and seventy-eight (378), the said remainder to her after the death of said Susan Brayfield remains undisposed of, and the property thus devised by said will should be sold and the proceeds distributed among the persons entitled thereto; because, as the complainants aver, the same is not susceptible of partition in kind among the parties in interest, and cannot be divided without great loss and injury to them, and the complainants aver, that the proceeds of sale of said part of lot 18, in square 378, were distributed under the order of this court among the heirs-at-law of said testator including the said Susan Brayfield; all of which will more fully and at large appear by reference to the proceedings and decrees in said cause, which the complainants pray may be read and considered as part hereof.

12. The complainants are advised and believe and so aver, that the decree in said equity cause declaring said devise lapsed, dated the 4th day of December, 1869, properly interpreted, likewise practically determined all questions as to said remainder devised to said Martha Ann Mitchell in said will, and also all devises therein to said William H. De Vaughn, deceased; and a reservation of equities provided for at the foot of said decree, was simply made for the purpose of postponing action until the death of said Susan Brayfield the said life tenant; a true copy of said decree is
11 herewith filed marked "Decree" and made part hereof.

13. That the several parcels of real estate and premises embraced in said remainder in said last will and testament to said Martha Ann Mitchell, deceased, and in reference to which the complainants aver, the devise therein lapsed, as aforesaid, is described by metes and bounds as follows, to wit:

(1) All that certain piece or parcel of ground and premises situated in the city of Washington and District of Columbia, and designated upon the plan or plat of said city as the west half (½) of original lot numbered twenty (20) in square numbered three hundred and seventy-eight (378), improved by two brick houses.

(2) All that certain piece or parcel of ground and premises situated in the city of Washington and District of Columbia, and designated upon the ground plan or plat of said city as part of original lot numbered twenty-one (21) in square numbered three hundred and seventy-eight (378), beginning for the same at a point on the east line of said lot on 9th street, forty-seven (47) feet seven and one-half (7½) inches south from the northeast corner of said lot and running thence south along said east line of said lot twenty-eight (28) feet one and a half (1½) inches, thence west fifty-nine (59) feet four and a — (4½) inches to a four (4) foot alley, thence north along the line of said alley twenty-eight (28) feet one and one-half (1½) inches, thence east fifty-nine (59) feet four and a half (4½) inches to

said 9th street and place of beginning; improved by two brick houses.

(3) All those certain pieces or parcels of ground and
12 premises, situated in the city of Washington and District of Columbia, and designated upon the ground plan or plat of said city as all of original lots numbered three (3) and seven (7), and parts of original lots numbered four (4) and six (6) in square numbered four hundred and eighty-three (483), and described by metes and bounds as follows to wit: Beginning for the same at the southwest corner of said lot numbered three (3), and running thence north along the line of 6th street west ninety (90) feet, thence east one hundred and eighty-six (186) feet nine (9) inches to 5th street west, thence south along the line of said 5th street west ninety (90) feet to a ten (10) foot alley, thence west along the north line of said alley one hundred and eighty-six (186) feet nine (9) inches to said 6th street west and place of beginning; the same being occupied as a lumber yard.

14. That all of said described real estate and premises is now under rental except 908 E street, and the aggregate monthly rental value of all said property is about two hundred and seventy dollars, and since the death of said Susan Brayfield the tenants in said part of square 483 have not paid rent; and complainants aver that it would be for the interest and advantage of all persons interested in said real estate that a receiver be appointed for all of said real estate, with authority to collect rents, pay taxes and discharge such other duties as the court may impose upon him in the premises until final decree in this cause.

15. That complainants further show that the said described
13 real estate and premises are in the possession of said defendant Mary R. Porter through her tenants, and that she has been collecting the rents therefrom except the said part of square 483 and 908 E street northwest, since the death of said life tenant, and she renders herself ready and willing to account for the same to the court or to any one authorized thereby, as complainants are informed and believe and so aver.

16. That since the filing of the original bill herein the complainants have learned, believe and so charge that the defendants named therein as follows, to wit: Emma R. De Vaughn, Catharine L. De Vaughn, John Stanley, Susan Beach, Susan De Vaughn, John De Vaughn, Ann De Vaughn, George Mitchell, Martha De Vaughn, Rebecca G. Mitchell, had departed this life, intestate at the time said bill was filed, and that the defendant Elizabeth M. De Vaughn had intermarried with said Melvin N. Dillon, and the defendant Sarah W. Mitchell had intermarried with said John B. Hutchinson; and it has come to the knowledge of the complainants that since the filing of the original bill herein Sarah De Vaughn, the wife of the defendant William H. De Vaughn departed this life, and further that said Alice Crown, Fillmore Harrison, Harriet W. Harrison, Walter D. Harrison, George W. Harrison and Ida Harrison are the only heirs-at-law of Catharine Sophia Harrison; and complainants further state that they are informed and believe and so aver that all

the heirs-at-law of said descendants, defendants to said original bill as aforesaid are parties to this amended and supplemental bill.

14 *Prayer.*

The complainants therefore pray as follows:

1. That a decree may be passed declaring that said devises in said last will and testament in remainder to said Martha Ann Mitchell and to her heirs begotten of her body and their heirs and assigns forever involving the said described real estate, lapsed and became void, and that said real estate at the death of said testator became vested in his heirs-at-law subject only to the life estate of said life tenant Susan Brayfield which has terminated by her death.

2. That said described real estate and premises may be sold under the direction of and by trustee or trustees appointed by decree of this honorable court and the proceeds of sale, after deducting all proper costs, expenses and allowances distributed among the parties lawfully entitled thereto according to their respective rights.

3. That until such sale is had and confirmed some suitable person be appointed receiver with full power to manage said premises and collect all rents, issues and profits therefrom, including such sums as may have been received by said Mary R. Porter or others since the death of said Susan Brayfield.

4. That for the purpose aforesaid all necessary accounts may be taken, directions given and inquiries made.

5. That the complainants may have such further or other relief in the premises as the nature of the case may require.

To which end the complainants pray for process against
15 the defendants—William H. De Vaughn, Samuel P. De Vaughn, Elizabeth De Vaughn, Catharine Spalding, George S[illegible]lding, Sarah Stanley, Elizabeth Kelly, William Kelly, Charles Beach, Carrie L. Beach, Louis L. Beach, Emma C. Beach, Caroline S. De Vaughn, Charles J. De Vaughn, Martha E. De Vaughn, Thomas H. De Vaughn, Elizabeth M. Dillon, Melvin N. Dillon, George E. Kirk, John H. De Vaughn, Alice E. De Vaughn, Edgar N. De Vaughn, Amanda E. Watkins, George W. Watkins, Mary A. Robey, Andrew V. B. Robey, Addison De Vaughn, Margaret De Vaughn, Mary R. Porter, James B. Porter, Jane Davis, Elijah Davis, Alice Crown, Winfield Crown, Martha E. Hughes, George A. R. Hughes, Sarah E. Bean, William H. Bean, Fannie Sullivan, Fillmore Harrison, Harriet W. Harrison, Walter D. Harrison, George W. Harrison, Ida Harrison, Benjamin D. Mitchell, Jennie Mitchell, Richard R. Mitchell, Sarah W. Hutchinson and John B. Hutchinson, requiring them and each of them to appear and answer the exigency of this amended bill.

The defendants to this amended and supplemental bill of complaint are as follows: William H. De Vaughn, Samuel P. De Vaughn, Elizabeth De Vaughn, Catharine Spalding, George Spalding, Sarah Stanley, Elizabeth Kelly, William Kelly, Charles Beach, Carrie L. Beach, Louis L. Beach, Emma C. Beach, Caroline S. De Vaughn, Charles J. De Vaughn, Martha E. De Vaughn, Thomas

H. De Vaughn, Elizabeth M. Dillon, Melvin N. Dillon, George E. Kirk, John H. De Vaughn, Alice E. De Vaughn, Edgar N. De Vaughn, Amanda E. Watkins, George W. Watkins, Mary A.
16 Robey, Andrew V. B. Robey, Addison De Vaughn, Margaret De Vaughn, Mary R. Porter, James B. Porter, Martha E. Hughes, George A. R. Hughes, Sarah E. Bean, William H. Bean, Fannie Sullivan, Jane Davis, Elijah Davis, Alice Crown, Winfield Crown, Fillmore Harrison, Harriet W. Harrison, Walter D. Harrison, George W. Harrison, Ida Harrison, Benjamin D. Mitchell, Jennie Mitchell, Richard R. Mitchell, Sarah W. Hutchinson and John B. Hutchinson.

REBECCA J. KIRK.

C. E. NICOL,
Sol'r for Complainants.

DISTRICT OF COLUMBIA, *ss:*

I, Rebecca J. Kirk, one of the complainants in the above-entitled cause do solemnly swear that I have read the foregoing bill by me subscribed and know the contents thereof, and that the facts therein stated upon personal knowledge are true, and that the facts therein stated upon information and belief I verily believe to be true.

REBECCA J. KIRK.

Subscribed and sworn to before me this 6th day of April, A. D. 1892.

[SEAL.] RAYMOND J. DONALDSON,
Notary Public.

(Endorsed:) No. 13602. Eq. James H. De Vaughn *et al. vs.* William H. De Vaughn *et al.* Amended bill. Filed May 19, 1892. J. R. Young, clerk. The clerk will please file this amended and supplemental bill & exhibits and issue process. C. E. Nicol, l'r for complainants.

17 (EXHIBIT TO BILL.)

"*Will.*"

In the name of God, amen—I, Samuel De Vaughn of the city and county of Washington, and District of Columbia, being in perfect health of body, and of sound and disposing mind, memory and understanding, considering the certainty of death, and the uncertainty of the time thereof, and being desirous to settle my worldly affairs, and thereby be the better prepared to leave this world when it shall please God to call me hence, do therefore make and publish this my last will and testament in manner and form following that is to say:—

First and principally—

I commit my soul into the hands of Almighty God, and my body to the earth to be decently buried at the discretion of my executor hereinafter named, and after my debts and funeral charges are paid—

I give and bequeath unto my sister Susan Brayfield all my personal property of whatever description—

Item. I give and devise unto my sister Susan Brayfield the whole of square four hundred and eighty-three and improvement also, lots twenty, twenty-one, and part of lot twenty-two in square three hundred and seventy-eight, situated in the city of Washington during her natural life, and at her death to her daughters Mary Rebecca Brayfield, Catharine Sophia Harrison, and Martha Ann Mitchell, to be divided in the following manner, that is to say:—Martha Ann shall have one-half of lot twenty, as subdivided, being seventy-three feet deep, having on the same two houses. To Catharine Sophia the other half, (being the east half) of said lot twenty having also on the same two houses, and Mary Rebecca shall have the corner store situated on lot twenty-one. Catharine Sophia shall have the two houses next south of said corner store on said lot twenty-one, and Martha Ann shall have the next two houses south
of the two to Catharine Sophia, and adjoining the same on
18 said lot twenty-one, and Mary Rebecca shall have the whole
of that part of lot twenty-two, as subdivided from lot twenty and improvements, during their natural lives, and after their death to their heirs begotten of their bodies, and to their heirs and assigns forever.—

I also desire that square four hundred and eighty-three shall be subdivided at the death of my sister Susan Brayfield and distributed as follows:—Mary Rebecca Brayfield shall have the whole front on K, street, ninety feet deep to a ten-foot alley, which comprises lots one and two, with all improvements on the same, Martha Ann Mitchell shall have ninety feet on Sixth street, running that breadth through the square to Fifth street, and Catharine Sophia Harrison shall have the remainder north portion of said square four hundred and eighty-three during their natural lives, and at their death to be equally divided among the heirs of their bodies begotten share and share alike, and to their heirs and assigns forever.

Item. I give and devise to Mary Rebecca Brayfield the east part of lot nineteen in square three hundred and seventy-eight and all improvements on said lot, front and rear, during her natural life, and after her death to her heirs and assigns forever.

Item. I give and devise to Catharine Sophia Harrison the east part of lot seventeen in square three hundred and seventy-eight including all improvements, and also that part as subdivided in the rear in said square during her natural life, and after her death to the heirs of her body begotten, and to their heirs and assigns forever,—

19 Item. I give and devise to Martha Ann Mitchell, daughter of Susan Brayfield the west part of lot eighteen in square three hundred and seventy-eight and all improvements, including that part as subdivided in the rear on said square, and to her heirs and assigns forever.

I give and bequeath to my mother during her natural life, out of the rents of lots No. twenty, twenty-one, and part of twenty-two in square three hundred and seventy-eight, and also the whole of

square four hundred and eighty-three, devised to my sister, Susan Brayfield, the sum of twenty-five dollars per month or if properly provided for by my said sister, then only five dollars per month for her own use as she may think proper.

Item. I give and devise to my brother John De Vaughan, in square four hundred and eight, lot D and parts of lots five in square four hundred and five, and lot two in square four hundred and eighty-seven, and all improvements, also lot eleven in square five hundred and seventeen, lots four and five in square *four and five in square* seven hundred and eighty-five, and to his heirs and assigns forever—all of which property is situated in the city of Washington and District of Columbia.

Item. I give and devise unto my brother William De Vaughan, of the city of Alexandria, State of Virginia, lot three in square one thousand ninety-five, lot one in square six hundred and seventy-seven, lot four in square forty-four, lot two in square one hundred and twenty-nine. Also lots B, C, D, F, and G, in square forty-three, all lying and being in the city of Washington and District of Columbia, also the house and lot on Henry street in the city of Alexandria, State of Virginia, and to his heirs and assigns forever—

And lastly I do hereby constitute and appoint Doctor Alexander McDonald Davis of the city of Washington, District of Columbia to be sole executor of this my last will and testament, revoking and annulling all former wills by me heretofore made, ratifying and confirming this and none other to be my last will and testament.

In testimony whereof I have hereunto set my hand and affixed my seal this (20) twenty*eth* day of April in the year of our Lord one thousand eight hundred and sixty-one.

SAM'L DE VAUGHAN. [SEAL.]

Signed, sealed, published and declared by Samuel De Vaughan the above-named testator, as and for his last will and testament in the presence of us, who, at his request, in his presence, and in the presence of each other, have subscribed our names as witnesses hereto.

W. T. DOVE.
R. J. RYON.
Attest: J. RUSSELL BARR.

50-cent internal revenue stamp.

(Endorsed:) No. 13602. Equity. De Vaughn *et al. vs.* De Vaughn *et al.* Exhibit to amended and supplemental bill. "Will." Filed May 19, 1892. J. R. Young, clerk.

21 (EXHIBIT TO BILL.)

"*Decree.*"

In the Supreme Court of the District of Columbia.

WILLIAM H. DE VAUGHN *et al.*
vs.
JOHN H. DE VAUGHN *et al.* } No. 1164. Equity.

This cause having been heard in the first instance in this court upon the order and record of the equity court and upon argument of counsel on both sides, and the court being thereupon of opinion that the devise by Samuel De Vaughn to William De Vaughn in the pleadings mentioned and the devise to Martha Ann Mitchell of "the west part of lot 18 in square 378 and all improvements including that part as subdivided in the rear of said square" both lapsed in the lifetime of the testator, and that as to said property he died intestate and it descended to his heirs-at-law and is subject to partition among them as tenants in common, but the locality, quantity and metes and bounds thereof being unknown to the court, it is thereupon ordered, that it be referred to the auditor to enquire of and report to the equity court said locality, quantity and metes and bounds and whether said property can be partitioned between said heirs-at-law or not to the end that said equity court may further proceed in the cause as may seem just and right.

And as to the property devised to said Martha Ann Mitchell, in which Mrs. Susan Brayfield has a life estate the equities between said Martha Ann and said heirs-at-law are reserved.

Dec. 4th, 1869.

(Endorsed:) No. 13602. Eq. James H. De Vaughn *et al. vs.* William H. De Vaughn *et al.* Exhibit to amended and supplemental bill. "Decree." Filed May 19, 1892. J. R. Young, clerk.

22 In the Supreme Court of the District of Columbia.

JAMES H. DE VAUGHN *et al.*, Complainants,
vs.
BENJAMIN D. V. MITCHELL, RICHARD G. Mitchell, Sarah W. Hutchinson, and John B. Hutchinson, Her Husband, *et al.*, Defendants. } Equity. No. 13602.

Demurrer.

(Filed May 25, 1892.)

Now come, of the above-named defendants in the above-entitled cause, to wit, Sarah W. Hutchinson, and her husband, John B. Hutchinson, Benjamin D. V. Mitchell and Richard G. Mitchell, and waive

the issuing and service, as to them, of process in the case, and voluntarily enter the appearance of each of them in said cause, and upon such appearance, they now demur to the "amended and supplemental bill," filed in said cause, by leave of the court on the 19th of May, 1892, and for grounds of demurrer show:

First. That the complainants have not, in and by their said amended and supplemental bill, nor by the original bill to which it is an amendment and supplement, nor by the two taken together, stated a case which entitles them, or either of them, in a court of equity, to any relief from or against these defendants as to the matters in said amended and supplemental bill, and in said original bill, contained.

Second. That it appears by the averments contained in the said original bill, and in said amended and supplemental bill, and in the two taken together, that the estate devised in the will of Samuel De Vaughn, which is set forth in said amended and supplemental bill, in the exhibit thereto, and made a part thereof, and marked "Will," to Susan Brayfield during her natural life, and after her death to her daughter, Martha Ann Mitchell, during her natural life, and after her death, to her heirs begotten of her body, and to their heirs and assigns forever, and which estate, so devised, said original bill and said supplemental and amended bill claim elapsed by reason of the death of said Martha Ann Mitchell prior to the death of said testator, Samuel De Vaughn, did not, as a matter of law, lapse, but on the contrary, said premises and estate, so devised, passed, subject to a life estate in said Susan Brayfield, upon and after the death of the said testator, and the due probate of his said will, as a vested estate in remainder, and in fee-simple to the children of the
23 said Martha Ann Mitchell, begotten of her body who were living at the death of the said testator, to wit, to these demurrants, Sarah W. Mitchell, (now Sarah W. Hutchinson), Richard G. Mitchell, (erroneously named in said amended and supplemental bill, Richard R. Mitchell), and Benjamin D. V. Mitchell (erroneously named in said amended and supplemental bill, Benjamin D. Mitchell.)

SHELLABARGER & WILSON,
Sol's for Demurrants.

In our opinion the foregoing demurrer is well founded in law.

SHELLABARGER & WILSON,
Sol's for Demurrants.

CITY OF ANNAPOLIS, }
State of Maryland, } *ss:*

Before me personally appeared Benjamin D. V. Mitchell, who on his oath, says: That he is one of the parties defendant in the above-entitled cause, and that the foregoing demurrer to the original and the amended and the supplemental bills in said cause is not interposed for delay.

BENJAMIN D. V. MITCHELL.

Subscribed and sworn to before me this 24th day of May, A. D. 1892.

[SEAL.] J. ROLAND BRADY,
Notary Public.

(Endorsed:) Equity. No. 13602. In the supreme court of the District of Columbia. James H. De Vaughn *et al.*, complainants, *vs.* Benjamin D. V. Mitchell *et al.*, defendants. Demurrer to amended and supplemental bill of complaint. Shellabarger & Wilson, solicitors for demurrants. Filed May 25, 1892. J. R. Young, clerk.

24 In the Supreme Court of the District of Columbia, Holding an Equity Term.

JAMES H. DE VAUGHN, EMILY DE VAUGHN, & REBECCA J. KIRK, Complainants,
vs.
BENJAMIN D. V. MITCHELL, RICHARD G. Mitchell, Sarah W. Hutchinson & Her Husband, John B. Hutchinson, *et als.*, Defendants. } In Equity. No. 13602.

Decree of Court Below.

This cause came on to be heard by the court upon the demurrer filed by the defendants, Benjamin D. V. Mitchell, Richard G. Mitchell, Sarah W. Hutchinson, and her husband, John B. Hutchinson, to the above-named amended and supplemental bill No. 13602, and was argued by counsel for the respective parties, submitted, and by the court, duly considered:

Whereupon, it is, by the court, adjudged, ordered and decreed, that the said demurrer by the said defendants, Benjamin D. V. Mitchell, Richard G. Mitchell, Sarah W. Hutchinson and her husband, John B. Hutchinson be, and the same is hereby sustained; and the said complainants, and the defendants herein other than the said demurrants, having made known to the court that they did not desire to amend their said bill, and elected to stand on the same, it is, thereupon, by the court, now, here, ordered, adjudged and decreed that the equity of the case, as between said demurrants and the other parties to the suit, is with the said demurrants.

And the court further orders, adjudges and decrees, that the lands, premises and appurtenances described in said amended and supplemental bill, and in the exhibit thereto, made part hereof, and marked "Will," as devised by the last will and testament of Samuel De Vaughn unto the heirs of the body of Martha Ann Mitchell, begotten, and to their heirs and assigns forever, did not lapse by reason of the death of said Martha Ann Mitchell before that of the said testator, Samuel De Vaughn, but on the contrary at the death of the said testator vested, in remainder, in the said demurrants, Benjamin D. V. Mitchell, Richard G. Mitchell, and Sarah W. Hutchin-

son, and, upon and after the death of the Susan Brayfield
25 named in said will, the said Benjamin D. V. Mitchell, Richard G. Mitchell, and Sarah W. Hutchinson, became in equal right, entitled as tenants in common, in fee-simple, to the said premises and appurtenances so devised to the said heirs of the body of Martha Ann Mitchell, begotten, to wit, the said Benjamin D. V. Mitchell, Richard C. Mitchell, and Sarah W. Hutchinson, who now own the same in fee-simple.

And the court further orders, adjudges and decrees that the said bill in equity be, and the same is hereby dismissed, with costs, for which costs the said defendants, Benjamin D. V. Mitchell, Richard G. Mitchell and Sarah W. Hutchinson shall have execution as at law; said bill, however, being retained as hereinafter provided, for the purpose only of having the receivers herein state their account to the auditor, and pay over the balance, when found to the defendants, hereinafter named.

And the court further orders, adjudges and decrees that this cause shall be, and the same is hereby referred to the auditor of this court to take an account of the rents and profits of said premises hereby decreed to belong to the said Benjamin D. V. Mitchell, Richard G. Mitchell and Sarah W. Hutchinson, and which rents and profits have been, or shall be, collected by the said receivers herein appointed, and, also of the expenses incurred on account of the same, as hereinafter found by this court; and that such receivers shall, forthwith, upon and after said finding by the court, pay the said rents and profits, so found to be in their possession, in equal parts, to the said Benjamin D. V. Mitchell, Richard G. Mitchell, and Sarah W. Hutchinson.

26 And the court further orders, adjudges and decrees that the said receivers shall, forthwith, surrender possession of the said premises to the said demurrants, Benjamin D. V. Mitchell, Richard G. Mitchell, Sarah W. Hutchinson and her husband John B. Hutchinson, and save only as to their responsibility for said rents, said receivers are hereby discharged.

(Signed) A. C. BRADLEY, *Justice.*

December 16, 1892.

From this decree an appeal is taken in open court to the general term.

(Endorsed:) 13602. In the supreme court of the District of Columbia. Equity. No. 13602. James H. De Vaughn *et als.*, complainants, *vs.* Benjamin D. V. Mitchell *et als.*, defendants. Decree sustaining demurrer to bill, &c. Filed Dec. 16, 1892. J. R. Young, clerk.

27 Court of Appeals of the District of Columbia, November 23rd, 1893.

JAMES H. DE VAUGHN *et al.*, Appellants,
vs.
WILLIAM H. DE VAUGHN *et al.* } No. 150.

The argument of this cause was commenced by Mr. C. E. Nicol, for the appellants, and continued by Mr. J. M. Wilson, for the appellees.

Court of Appeals of the District of Columbia, November 24th, 1893.

JAMES H. DE VAUGHN *et al.*, Appellants,
vs.
WILLIAM H. DE VAUGHN *et al.* } No. 150.

The argument of this cause was continued by Mr. J. M. Wilson and Mr. Samuel Shellabarger, for the appellees, and concluded by Mr. H. O. Claughton, for the appellants.

28 Mr. Chief Justice ALVEY delivered the opinion of the court:

The bill in this case was filed by those who claimed to be the heirs-at-law of Samuel De Vaughn, who died in this District in 1867, leaving a last will and testament, dated the 20th of April, 1861. The will was admitted to probate about the 1st of September, 1867, a copy of which is exhibited with the bill as part thereof. The testator was seized of and left large real estate, situate in this District; and he devised the same to his brothers and sisters, a portion of which he devised to his sister, Susan Brayfield, and her three daughters, as follows:

"*Item.* I give and devise unto my sister, Susan Brayfield, the whole of square four hundred and eighty-three and improvements; also lots twenty, twenty-one and part of lot twenty-two, in square three hundred and seventy-eight, situated in the city of Washington, during her natural life, and at her death to her daughters, Mary Rebecca Brayfield, Catharine Sophia Harrison, and Martha Ann Mitchell, to be divided in the following manner, that is to say: Martha Ann shall have one-half of lot twenty, as subdivided, being seventy-three feet deep, having on the same two houses; to Catharine Sophia the other half (being the east half) of said lot twenty, having also on the same two houses; and Mary Rebecca shall have the corner store situated on lot twenty-one; Catharine Sophia shall have the two houses next south of the said corner store on said lot twenty-one; and Martha Ann shall have the next two houses south of the two to Catharine Sophia, and adjoining the same on said lot twenty-one, and Mary Rebecca shall have the whole of that part of lot twenty-two as subdivided from lot twenty, and improvements, during their natural lives, and after their death to their heirs begotten of their bodies, and to their heirs and assigns forever.

"I do desire that square four hundred and eighty-three shall be subdivided at the death of my sister Susan Brayfield, and distributed

as follows: Mary Rebecca Brayfield shall have the whole front on K street, ninety feet deep to a ten-foot alley, which comprises lots one and two, with all improvements on the same; Martha Ann Mitchell shall have ninety feet on Sixth street, running that breadth through the square to Fifth street; and Catharine Sophia Harrison shall have the remainder north portion of said square four hundred and eighty-three, during their natural lives, and at their death to be equally divided among the heirs of their bodies begotten, share and share alike, and to their heirs and assigns forever." * * *

"*Item.* I give and devise to Martha Ann Mitchell, daughter of Susan Brayfield, the west part of lot eighteen, in square three hundred and seventy-eight, and all improvements, including that part as subdivided in the rear on said square, and to her heirs and assigns forever."

Mrs. Susan Brayfield, the tenant for life, died in December, 1891; and Mrs. Martha Ann Mitchell, one of the daughters of Mrs. Brayfield, and one of the devisees in remainder named in the will, died some time in the year 1866, before the death of the testator, Samuel De Vaughn, leaving as her only children and heirs-at-law surviving her, Benjamin D. Mitchell, Richard R. Mitchell and Sarah W. Hutchinson. These parties, with others, are defendants to the bill.

The bill is filed for sale, and partition of the proceeds of sale, among the heirs-at-law of Samuel De Vaughn, the testator, upon the theory and contention of the plaintiffs, that as Mrs. Mitchell predeceased the testator, the estate in remainder limited to her for and *during her natural life*, and at her death to the heirs of her body begotten, and *to their heirs and assigns forever*, lapsed and fell back into the estate of the deceased Samuel De Vaughn; and this upon the theory that, by the operation of the rule in Shelley's case, 1 Co., 94, Mrs. Mitchell took an estate in fee-simple under the devise, and not a mere life estate, according to the literal terms employed by the testator; and, consequently, upon the death of the testator, the estate devised became vested in his heirs-at-law subject only to the life estate devised to the sister, Mrs. Susan Brayfield.

The defendants, the children of Mrs. Mitchell, upon their contention that their mother took but an estate for life in the property devised, subject to the prior life estate to Mrs. Susan Brayfield, and that the ultimate remainder vested in them as devisees by way of purchase, and therefore there was no lapse of the devise, demurred to the bill, and thus raised question as to the true construction of the devise involved in this case.

29 In the construction of wills the rule is paramount that the intention of the testator must prevail, unless it clearly conflicts with some settled rule of law that will not give way to such intention. In arriving at the intention of the testator, we must read the whole will together, and give to each term employed its full and natural meaning; and no words of the testator should be rejected, or refused their sensible meaning in the place where employed, unless it be required to make sense for the context of the will. It is competent to the testator, however, to use technical terms in a sense different from the technical meaning ordinarily attached

to them, and to explain the sense in which such terms are used; but, to do this effectually, plain explanatory words must be used, or the sense in which the terms are employed, differing from their ordinary meaning, must be so plainly inferable that there can be no misunderstanding of what is meant.

In this case, it will be observed, the testator, in the first clause of the devise, wherein he gives the whole of square 483, and also lots 20, 21, and part of lot 22, in square 378, to Mrs. Brayfield for life, limits the remainder to her three daughters during their natural lives, and after their death to their heirs begotten of their bodies, and to their heirs and assigns forever. And then he gives specific direction for the subdivision and distribution of square 483, after the death of Mrs. Brayfield, among the three daughters; and again, as if to emphasize and make more explicit his meaning, he repeats the limitations, and declares that the daughters shall have their respective subdivisions of the square, *during their natural lives*, and at their death, *to be equally divided among the heirs of their bodies begotten, share and share alike*, and *to their heirs* and assigns forever. Though the limitations in the two paragraphs are substantially the same, yet in the latter paragraph the testator appears to have been designedly more explicit in the expression of his intention than in the preceding paragraph.

We have then in this devise, in express terms, 1st, a devise to the daughter for her natural life; 2d, at her death, the property directed to be equally divided among the heirs of her body begotten, share and share alike; and 3d, with words of limitation added appropriate to limit a fee-simple estate in the heirs of the body, if these latter words be read as the equivalent of children.

Now, keeping in mind the principle that the intention must control, it would seem difficult, upon any principle of natural construction, to resist the conclusion, upon the terms of the devise, that Mrs. Mitchell took a life estate only, and the direction to divide the property equally, at her death, among the heirs of her body, was simply a direction that the property should be divided among her children. If not, why the express limitation for life to the mother? Or why the direction for equal partition of the property among the heirs of the body? Or why the superadded limitation to the heirs of the latter? If a fee-simple estate was intended to pass to Mrs. Mitchell, and not to her children as independent devisees, all this elaborate phraseology to define the rights of the parties would have been quite useless. Indeed, the construction contended for by the plaintiffs in this case requires us to reject all the words directing partition, and also the superadded words of limitation, and to deprive them not only of their ordinary meaning, but of all meaning whatever. There is no sufficient reason apparent for depriving these terms of all meaning, or for supposing that the testator used them without understanding either their legal or natural import. It is quite clear, from subsequent clauses of the will, that when he desired to devise an estate in fee, he knew what appropriate terms should be employed; as is shown in the devise to Mrs. Mitchell of

the west part of lot 18 in square 378, and also in the devises to his two brothers.

It is unquestionably true, upon the assumption that the devise to Mrs. Mitchell was of a fee-simple estate, that such devise would lapse as contended by the plaintiffs; for, in such case, Mrs. Mitchell being dead at the time of the devise, her heirs could not take by descent, because their ancestor never had vested in her any descendible estate; and consequently the devise would lapse and become void, and the estate fall back into the estate of the testator. It is in view of this general principle that the plaintiffs have contended that the life estate limited to Mrs. Mitchell, by operation of the rule in Shelley's case, coalesced with the remainder over, limited to the heirs of her body, and thus constituted an estate tail general at the common law; and that, by force of the statute to direct descents, such estate tail was enlarged into an estate in fee-simple. It is upon this theory, as to the construction of the devise, that the present bill was filed. The court below held that Mrs. Mitchell took a life estate only under the devise, and that her children took an estate in fee-simple in the remainder, subject to the life estate of Mrs. Susan Brayfield, and decreed accordingly. And in that conclusion we entirely concur.

It is certainly a well-settled principle in the law of real property, indeed as well settled as the rule in Shelley's case itself, that where an estate is expressly devised to a person for life, with remainder to the *heirs of his body*, and there are words of explanation annexed to such word *heirs*, from whence it may be collected that the testator meant to qualify the meaning of the word *heirs*, and not to use it in a technical sense, but as descriptive of the person or persons to whom he intended to give his estate, after the death of the first devisee, the word *heirs* will, in such case, operate as a word of purchase. This is stated as the result of the decisions by Mr. Cruise, in his Digest, vol. 6, tit. 38, ch. 14, page 318, and it is supported by a long line of cases, both English and American.

The devise to Mrs. Mitchell for life and then to the heirs of her body, without more, would unquestionably have passed an estate tail only, at the common law, to the first devisee, Mrs. Mitchell; but the effect of the superadded words of limitation of heirs generally to succeed the heirs of the body, directed a different course of descent, according to the principles of the common law. And, upon the same principle, if an estate be devised to a person for life, remainder to his issue (the word *issue* being a word of limitation or of purchase, according to the context), with words of limitation superadded, the word issue will be considered as a word of purchase, by reason of the effect to be given to the superadded words of limitation. Loddington *v.* Kyme, 1 Lord Raym., 203. In other words, in obedience to the general principle that every word in a devise should be given its full effect, the superadded words of limitation are allowed their full effect. The principle has been uniformly recognized, even by those who have been the strongest advocates for maintaining the rule in Shelley's case in all its original integrity; and superadded words of limitation will control the meaning of the words *heirs of the body*, as they do the word issue;

and convert those terms into mere words of description of the person or persons to take, as new stocks of inheritance. The principle of the cases was fully and elaborately explained by Lord Mansfield, in Doe on dem. of Long *v.* Laming, 2 Burr, 1100, 1106, where it was held, citing and relying upon the case of Bagshaw *v.* Spencer, 2 Atk., 246, 577, 579, 582, that the words *heirs of the body*, followed by the words of limitation, "and to their heirs and assigns forever," were to be taken as words of description of children. That case has been followed in many subsequent cases; and the principle and reasoning of that case fully apply to the case now before us, though some of the circumstances of that case were different from those of the present case. That case, however, fully and conclusively asserted the principle that the words *heirs of the body* may be explained to mean children, and that this explanation may be derived from the superadded words of limitation to the words heirs of the body, the words, *and to their heirs and assigns forever*, as well as from other words of explanation. The same principle is adopted and applied in the case of Right *v.* Creber, 5 B. & Cr., 866.

In the great and leading case in the English real-estate law of Jesson *v.* Wright, 2 Bligh, 1, decided in the House of Lords, opinions by Lord Eldon and Lord Redesdale, both strict adherents of the established technical definitions of estates, we find it admitted by Lord Eldon that the words *heirs of the body* which should generally be construed according to their legal import, will yield to a clear particular intent that the preceding estate should only be for life, and that may be from the effect of *superadded words*, or any expression showing *a particular intent* of the testator. Lord Redesdale used terms of qualification of the general principle maintained, of the same import. It was clearly admitted that the word *heirs* could be restrained by explanatory words to mean parties to take as purchasers under a devise. It is unnecessary to go more largely into an examination of the English cases. The American cases, and especially the cases decided by the Supreme Court of the United States, would seem to be quite conclusive of this case, against the contention of the plaintiffs.

In the case of Daniel *v.* Whartenby, 17 Wall., 639, the testator devised an estate to his son "during his natural life, and after his death to his issue by him lawfully begotten of his body, to such issue, their heirs and assigns forever." In case the son should die without lawful issue, then in that case, the testator devised the estate to his own widow and two sisters, "during the natural life of each of them, and the survivor of them," and after the death of all of them to J. W., his heirs and assigns forever. The son, the first devisee, survived the testator, and died without issue; and after the death of the widow of the testator and of his two sisters, J. W., the devisee in remainder, asserted claim; and it was held, upon full review of the authorities, that the rule in Shelley's case did not apply to the devise to the son, and that the estate taken by the son, the first taker, was not a fee tail, but was an estate for life only, with remainder in fee to the issue of his body, contingent upon the birth of such issue, and, in default of such issue, remainder for life to the

widow and the two sisters, with remainder over in fee to J. W., the plaintiff in the action of ejectment. In that case, the words *his issue lawfully begotten of his body*, were read as descriptive of children, and therefore words of purchase.

It is true, in that case, it is said that the words *issue of his body* are more flexible than the words *heirs of his body*, and that courts more readily interpret the former as the synonym of children and a mere *descriptio personarum* than the latter; yet it does not, by any means, follow that the words *heirs of his body* will not yield to that interpretation. Indeed, many of the cases cited in the opinion of the court were cases where the devises were to one for life, and to the heirs of his body, with superadded words of limitation to heirs generally, as in the case of Doe *v.* Laming, 2 Burr., 1100, relied on by the court. The learned justice who delivered the opinion of the court, in speaking of the effect of explanatory words upon technical words of limitation, says (we italicize), "But if there are explanatory and qualifying expressions, from which it appears that the *import of the technical language* is contrary *to the clear and plain intent* of the testator, *the former must yield* and the *latter will prevail.*"

That case has been repeatedly cited and the principle of it reaffirmed in subsequent cases in the Supreme Court; and it has been much cited with approval by other courts of the country. It may therefore be taken as a correct and authoritative exposition of the law upon the question involved. And in the courts of Maryland, where the law of real property is supposed to be the same as that which prevails in this District, except as it may have been changed by positive legislation since the cession by that State, the same principle of construction has been fully recognized and applied in numerous cases, as that now applied in this case. This will clearly appear upon examination of the cases of Horne *v.* Lyeth, 4 H. & J. 435; Chelton *v.* Henderson, 9 Gill, 432; Shreve *v.* Shreve, 43 Md., 382; Fullon *v.* Harman, 44 Md., 263, and Clarke *v.* Smith, 49 Md., 117.

We shall not undertake a review of all the numerous cases cited and quoted from in the elaborate briefs of counsel in this case. That there are cases that would seem to give support to the contention of the plaintiffs, may be conceded; but we think the decided weight of authority is against it, and supports the construction that we have given this devise.

Upon the whole, we are clearly of opinion that the words *heirs of their bodies begotten*, read in the light of the whole context of the devise, and with the superadded words of limitation, are to be taken as equivalent to children; and so reading the devise, the mother, Mrs. Mitchell, if she had survived the testator, would have taken an estate for life only, and her children, consequently, took an estate in fee, subject to the life estate of the grandmother, Mrs. Susan Brayfield.

It follows that the decree of the court below must be affirmed, and it is so ordered, with costs to the appellees.

Decree affirmed.

31 Court of Appeals of the District of Columbia, April Term, 1894.

JAMES H. DE VAUGHN *et al.*, Appellants, vs. WILLIAM H. DE VAUGHN *et al.* } No. 150. (Equity. 13602.)

Transferred from the supreme court of the District of Columbia pursuant to act of Congress of February 9th, 1893.

This cause came on to be heard on the record from the supreme court of the District of Columbia and was argued by counsel.

On consideration whereof it is now here ordered, adjudged, and decreed by this court that the decree of the said supreme court in this cause be, and the same is hereby, affirmed with costs.

Per MR. CHIEF JUSTICE ALVEY.

April 2, 1894.

32 In the Court of Appeals of the District of Columbia.

JAMES H. DE VAUGHN *et al.* vs. WILLIAM H. DE VAUGHN *et al.* } No. 13602. Eq.

And now come the complainants and all the other parties to this cause, except Sarah W. Hutchinson and her husband, John B. Hutchinson; Benjamin D. V. Mitchell, and Richard G. Mitchell, and pray the court for the allowance of an appeal in their behalf to the Supreme Court of the United States from the decree or judgment of the said Court of Appeals rendered in this cause, to wit, the 2d day of April, 1894, and also to fix the penalty of the supersedeas bond to be given on such appeal.

E. A. NEWMAN,
Sol'r for Compl'ts et al.
W. L. COLE,
Sol. for Appellants.

Please take notice that on Monday, the 9th day of April, 1894, at the opening of the Court of Appeals, at 10 o'clock a. m., or as soon thereafter as counsel may be heard, we will ask the court to grant the motion of which the foregoing is a true copy.

April 7th, 1894.

E. A. NEWMAN,
Sol'r for Complainants et al.

To Messrs. Shellabarger & Wilson, sol'rs for Sarah W. Hutchinson *et al.*

Service acknowledged.

SHELLABARGER & WILSON,
Sol'rs for Def'ts.

(Endorsed:) No. 150. Eq. De Vaughn *et al.*, *vs.* De Vaughn *et al.* Motion (& notice thereof) for an allowance of appeal to Supreme Court U. S. and to fix penalty of supersedeas bond. Court of Appeals, District of Columbia. Filed Apr. 9, 1894. Robert Willett, clerk.

33 Court of Appeals of the District of Columbia, April 9, 1894.

JAMES H. DE VAUGHN *et al.*, Appellants,
vs.
WM. H. DE VAUGHN *et al.* } No. 150.

On motion of Mr. W. L. Cole, for appellants, it is ordered by the court that an appeal to the Supreme Court of the United States from the decree entered herein by this court be, and the same is hereby, allowed.

Court of Appeals of the District of Columbia, April 10, 1894.

JAMES H. DE VAUGHN *et al.*, Appellants,
vs.
WM. H. DE VAUGHN *et al.* } No. 150.

On motion of Mr. W. L. Cole, for appellants, it is ordered by the court that the bond on the appeal herein to the Supreme Court of the United States be, and the same is hereby, fixed at the sum of $5,000.00.

34 Know all men by these presents that we, Mary R. Porter, James B. Porter, and George E. Kirk, as principals, and Augustus Burgdorf, as surety, are held and firmly bound unto Sarah W. Hutchinson and John B. Hutchinson, her husband; Benjamin D. V. Mitchell and Richard G. Mitchell, in the full and just sum of five thousand dollars ($5,000.00), to be paid to the said Sarah W. Hutchinson and John B. Hutchinson, her husband; Benjamin D. V. Mitchell, and Richard G. Mitchell, their certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 13th day of April, in the year of our Lord one thousand eight hundred and ninety-four.

Whereas lately, at a term of the Court of Appeals of the District of Columbia, in a suit depending in said court between James H. De Vaughn and others, as complainants, and William H. De Vaughn and others, as defendants, and numbered 13602, equity, a decree was rendered against the said complainants and others, including the said Mary R. Porter and James B. Porter, her husband, and George E. Kirk, and the said complainants and others, including the said Mary R. Porter and James B. Porter, her husband, and George E. Kirk, having taken and noted an appeal and had the same allowed by said court to reverse the decree in the aforesaid

suit, and a citation directed to the said Sarah W. Hutchinson and John B. Hutchinson, her husband; Benjamin D. V. Mitchell, and Richard G. Mitchell, citing and admonishing them to be and appear at a Supreme Court of the United States to be holden at Washington within 30 days from the date thereof:

Now, the condition of the above obligation is such that if the said complainant- and others, including the said Mary R. Porter and the said James B. Porter, her husband, and George E. Kirk, shall prosecute said appeal to effect and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

MARY R. PORTER. [SEAL.]
JAMES B. PORTER. [SEAL.]
G. E. KIRK. [SEAL.]
AUGUSTUS BURGDORF. [SEAL.]

Sealed and delivered in presence of—

ALBERT S. GATLEY,
As to Augustus Burgdorf.
CHAS. H. BAUMAN,
As to Mary R. Porter, James B. Porter, and G. E. Kirk.

Approved by—
SETH SHEPARD,
Associate Justice Court of Appeals, D. C.

April 13, 1894.

35 UNITED STATES OF AMERICA, *ss:*

To Sarah W. Hutchinson and John B. Hutchinson, her husband; Benjamin D. V. Mitchell, and Richard G. Mitchell, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to an order allowing an appeal filed in the clerk's office of the Court of Appeals of the District of Columbia, wherein James H. De Vaughn, Emily De Vaughn, his wife; Rebecca J. Kirk, William H. De Vaughn, Samuel P. De Vaughn, Elizabeth De Vaughn, Catharine Spalding, George Spalding, Sarah Stanley, Elizabeth Kelly, William Kelly, Charles Beach, Carrie L. Beach, Louis L. Beach, Emma C. Beach, Caroline S. De Vaughn, Charles J. De Vaughn, Martha E. De Vaughn, Thomas H. De Vaughn, Elizabeth M. Dillon, Melvin M. Dillon, George E. Kirk, John H. De Vaughn, Alice E. De Vaughn, Edgar N. De Vaughn, Amanda E. Watkins, George W. Watkins, Mary A. Robey, Andrew V. B. Robey, Addison De Vaughn, Margaret De Vaughn, Mary R. Porter, James B. Porter, Jane Davis, Elijah Davis, Alice Crown, Winfield Crown, Martha E. Hughes, George A. R. Hughes, Sarah E. Bean, William H. Bean, Fannie Sullivan, Filmore Harrison, Harriet W. Harrison, Walter D. Harrison, George W. Harrison, and

Ida Harrison are appellants and you are appellees, to show cause, if any there be, why the decree rendered against the said appellants, as in the said appeal mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

36 Witness the Honorable Richard H. Alvey, Chief Justice of the Court of Appeals of the District of Columbia, this 12th day of April, in the year of our Lord one thousand eight hundred and ninety-four.

[Seal Court of Appeals, District of Columbia.]

R. H. ALVEY, *Ch. Justice.*

Service acknowledged this 12th day of April, 1894.

SHELLABARGER & WILSON,
For Appellees, Sol'rs for Sarah W. Hutchinson and John B. Hutchinson, Her Husband; Benjamin D. V. Mitchell, and Richard G. Mitchell.

[Endorsed:] No. 150. Court of Appeals, District of Columbia. De Vaughn *et al. vs.* De Vaughn *et al.* Citation, with acknowledgement of service. Court of Appeals, District of Columbia. Filed Apr. 12, 1894. Robert Willett, clerk.

37 In the Court of Appeals of the District of Columbia.

JAMES H. DE VAUGHN *et al.*
vs.
WILLIAM H. DE VAUGHN *et al.*
} No. 13602. Equity.

It is hereby stipulated and agreed that the foregoing constitutes the record in the above-entitled cause and as such is to be certified by the clerk of the said Court of Appeals to the Supreme Court of the United States in pursuance of the appeal taken in said cause.

CHAPIN BROWN,
H. O. CLAUGHTON,
C. E. NICOL,
W. L. COLE,
GORDON & GORDON,
E. A. NEWMAN,
WOODBURY WHEELER,
For Appellants.
SHELLABARGER & WILSON,
Solicitors for Appellees.

38 Court of Appeals of the District of Columbia.

I, Robert Willett, clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing is a true copy of the record and of the proceedings of the said Court of Appeals as agreed upon by counsel in the case of James H. De Vaughn *et al. vs.* William H. De Vaughn *et al.*, No. 150, April term, 1894, as the same remain upon the files and records of said Court of Appeals.

Seal Court of Appeals, District of Columbia.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this 12th day of May, A. D. 1894.

ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: Case No. 15,603. District of Columbia Court of Appeals. Term No., 114. James H. De Vaughn, Emily De Vaughn, his wife; Mary R. Porter, James B. Porter, her husband, & George E. Kirk, *et al.*, appellants, *vs.* Sarah W. Hutchinson and John B. Hutchinson, her husband; Benjamin D. V. Mitchell, and Richard G. Mitchell. Filed June 13, 1894.

Seal Court of Appeals, District of Columbia.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this 12th day of May, A. D. 1894.

ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: Case No. 15,003. District of Columbia Court of Appeals. Term No. 114. James H. De Vaughn, Emily De Vaughn, his wife; Mary R. Porter, James B. Porter, her husband, & George E. Kirk, *et al.*, appellants, *vs.* Sarah W. Hutchinson and John B. Hutchinson, her husband; Benjamin D. V. Mitchell, and Richard G. Mitchell. Filed June 13, 1894.

165-566

IN THE

Supreme Court of the United States

DEVAUGHAN ET AL.

vs.

HUTCHINSON ET AL.

BRIEF OF THE SOLICITOR FOR W. H. DeVAUGHAN ET ALS.

H. O. CLAUGHTON,
CHAPIN BROWN,
Solicitors for W. H. DeVaughan and others, Heirs of John DeVaughan.

LAW REPORTER PRINT.

Office Supreme Court, U. S.
FILED.
OCT 30 1896
JAMES H. McKENNEY,
CLERK.

IN THE

SUPREME COURT OF THE UNITED STATES.

DEVAUGHAN ET AL.

vs.

HUTCHINSON ET AL.

Brief of the Solicitor for W. H. DeVaughan et als.

This controversy arises over the construction of a clause in the will of Samuel DeVaughan, which is as follows:

> "I give and devise to my sister, Susan Brayfield, (certain real estate) during her natural life, and at her death to Martha Ann Mitchell (her daughter) during her natural life, and after her death to her heirs begotten of her body *and to their heirs and assigns forever.*"

Martha Ann Mitchell died in the lifetime of the testator. Susan Brayfield survived him.

We will consider the case, in the first place, in respect to the estate which Martha Ann Mitchell would have taken under this clause, and the effect of her death in the lifetime of the testator upon that estate.

On behalf of the heirs-at-law of Samuel DeVaughan, the testator, it is claimed that there was devised to Martha Ann Mitchell an estate in fee simple, which lapsed, she having died in the lifetime of the testator. In other words, it is claimed that the Rule in Shelley's Case applied to this devise. What the Rule in Shelley's Case is we need not stop to discuss. That the rule is in full force in this jurisdiction is not controverted.

The ground upon which the application of the rule is denied is, that the superadded words, "and to their heirs and assigns forever," to the words, "after her death to her heirs begotten of her body," make the latter words words of purchase, and so qualify them as to give to Martha Ann Mitchell only a life estate, and therefore nothing but that life estate lapsed.

In some jurisdictions, the courts have departed from the law of England, as it was settled at the time of the Revolution; others have by statute abolished that law. This is all very interesting as a matter of legal history; but, after all, it has no effect upon the only question to be decided by this court, namely, what is the law in this jurisdiction?

It may be well, at the threshold of the discussion, to ascertain what the Supreme Court of the United States has held upon this point.

The Rule in Shelley's Case is in force in this jurisdiction.

Green *vs.* Green, 23 Wall. 486.

In a more recent case, the court held that, in a jurisdiction where the Rule in Shelley's Case is in force, the English decisions, not in conflict with each other, were declaratory of the law.

Daniel *vs.* Whartinby, 17 Wall. 639.

With these authorities to guide us, let us examine the English decisions upon the point we are now considering, namely, the effect of the engrafted words in this devise. To make the question perfectly clear, we will state the clause in general terms. A devise to A (the ancestress) for life, and after her death to her heirs begotten of her body, "and to their heirs and assigns forever." But for these engrafted words there would be no question of the application of the Rule in Shelley's Case. Do these engrafted words exclude the application of it? There is a long line of authorities which hold that they do not.

There are cases which hold that if the limitation is to the "*heir*" *in the singular number*, or "children," or "issue," if the intention of the testator, gathered from the whole will, shows that he intended the ancestor to take only an estate for life, this intention shall prevail. We need not stop to review this class of authorities, for they have no bearing upon the question in this case.

We return to the case stated, and we find that there is no real conflict of authority.

For convenience and clearness, we may classify these authorities as follows:

First. Those in which the same estate is limited to the ancestor and in the superadded words.

Second. Those in which the estates are not the same, the one being in tail and the other in fee simple.

Third. Those in which, though the language used in the devise would have created an estate tail in the one and a fee simple in the other, in jurisdictions where the law recognizes estates tail, but where this difference is immaterial because of the fact that in the jurisdiction where the devise is operative, estates tail have been abolished and converted into estates in fee simple.

Class I.

The first case under the first class is the very Shelley's Case in which Edward Shelley suffered a common recovery to the use of himself, for the term of his life, and after his death to the use of the heirs male of the body of said Edward lawfully begotten, and of the heirs male of the body of such heirs male lawfully begotten. The question in this case was, whether the superadded words did not make the former words words of purchase, and it was ultimately resolved by the Chancellor and all the judges of

England (except one of the Common Pleas) that the former words were words of limitation and not of purchase.

1 Coke's R., 93.

The case of Burnett *vs.* Coby was of this class—a devise to A for life, and after his decease to his heirs male, and to the heirs male of such issue male.

1 Barn. B. R., 367.

Menshall *vs.* Menshall, 1 Atk. 411; Dodson *vs.* Grew, 2 Wills. 322, are of this class also. The contention in this class of cases was simply that because the limitation was to the heirs of the heirs of the ancestor, the ancestor's heirs were intended to be a new stock, from which descent was to flow to their heirs.

These are cases in which it is by common consent the law that where the ancestor took the same kind of estate as that limited to his heirs by the superadded words, the first words are words of limitation. So that, if in the case at bar, according to these authorities, the same kind of estate was limited to Martha Ann Mitchell as that expressed in the superadded words, the Rule in Shelley's Case applied.

CLASS II.

We now proceed to the consideration of the cases of the second class, or those in which the estate limited to the ancestor was in tail, and that expressed in the superadded words was in fee simple. In these cases there is no conflict of authority. They hold that under such limitations the Rule in Shelley's Case applies. These are cases identical with the case at bar, in which the limitation was to the heirs of the body of the ancestor, and the superadded words expressed a fee simple.

The ground upon which the application of the Rule in Shelley's Case was denied in this class of cases was that the

estates were different in quality. The ancestor taking an estate in tail, and the heir taking in fee simple, the heir could not take by descent from the ancestor.

In the case of Goodnight *vs.* Pullyn, the devise was to N. for life, and after the death of the said N., the same unto the heirs male of the body of the said N. lawfully begotten, and his heirs forever. *Held,* that N. took an estate tail. Lord Raymond, 1487.

A similar decision was made by the Privy Council in the case of Morris d. of Andrews *vs.* Le Gay, 2 Atk., 249.

In the case of Wright *vs.* Pearson, the devise was to R. for life, remainder to the use of the heirs male of the body of R. and *their heirs;* Lord Keeper Henley held it to be an estate tail in R.

Ambler's R., 358.

Denn d. Geering *vs.* Shenton was a devise of lands to S. to hold to him and the heirs of his body lawfully begotten, *and their heirs forever.* Lord Mansfield and the rest of the court held that R. took an estate tail.

Cowper, 410.

In the case of Measure *vs.* Gee, the devise was to I. for life, and after the decease of I. to the heirs of the body of I. lawfully begotten, *and their heirs and assigns forever.* It was held that I. took an estate tail.

5 Barn. & Ald., 910.

But why repeat these authorities? They are too numerous to be given in detail. We simply refer to them.

Nash. *vs.* Nash., 3 Barn. & Adol., 339.
Kinch *vs.* Ward, 2 Sim. & Stu., 411.
Denn *vs.* Puckey, 5 Term R., 299.
Franklin *vs.* Lay, 2 Bligh Par. R., 59*n.*
King *vs.* Burchell, 1 Eden, 424; Amb., 379.
Frank *vs.* Stovin, 3 East, 548.

Mr. Jarman cites many of these cases, and remarks that the only case cited which afforded a shadow of opposition to the principle of the cases in the text was Doe *vs.* Goff, 11 East, 668, which had *other circumstances*, and has itself been overruled by the highest authority (2 Jarman, 275, note *a*); and he concludes his review of the authorities in this language:

> "Down to the very latest period, then, we have confirmation, if confirmation were wanted, of the inadequacy of words *of limitation in fee* annexed to heirs of the body to control their operation. The only remark suggested by recent decisions is an expression of surprise that adjudication should be deemed necessary on a point so clearly settled by anterior decisions."
>
> 2 Jarman, 275.

Mr. Fearne, Sec. 5, paragraph 26, page 181, states the rule as follows:

> "But if the words be heirs, or heirs of the body, &c., in the plural, in that case even words of limitation engrafted on them, if not inconsistent with the nature of the descent pointed out by the first words, will not convert them into words of purchase."

If a different conclusion had been possible, what would have been the effect of grafted words upon the grafted words, and so on "*ad infinitum*"? They are mere surplusage, because included in the first limitation.

We have, then, entire unanimity among the great law writers upon this question, as well as of all the courts of England. As we have said, these authorities are the law of this jurisdiction.

Before passing to the consideration of the third class and the American authorities, let us consider the question in the light of the law from which the Rule in Shelley's Case was evolved.

The application of that rule, in many of its bearings, is obnoxious to the severest criticism, but its utterance upon the point before us was an absolute necessity—logically, philosophically, theoretically and practically.

It is almost impossible for us, in the present condition of the law respecting tenures and the sovereignty of the owner of real estate, to realize what the law was under the feudal system, and how powerful the feudal system impressed itself upon the body of the law in succeeding generations.

At first, no higher estate than for life could be either granted or inherited. Under this state of the law, words of limitation were not necessary, because the taker could take only a life estate.

Afterwards, when estates of inheritance became lawful, it was necessary for the grantor or testator to use words which distinguished a life estate from an estate of inheritance. It became necessary for the law to prescribe the terms which should express the testator's intention that the decree should take a larger estate than a life interest, and these heirs were fixed by the law, it follows that the intention of those who made use of language upon which Parliament had placed its fiat, nor any other circumstance or consideration, could relieve the assurance from the impress which the sovereign power had affixed to the language in which it was couched.

Now, what was the supreme declaration? It was very simple in its expression, though far reaching in its results. It was simply this: Wherever in the same assurance there is an estate limited to the ancestor, and also to his heirs, the ancestor shall take an estate of inheritance. In other words, a grant to an ancestor and his heirs shall vest in the ancestor an estate of inheritance.

The court, in laying down the Rule in Shelley's Case, analyzed this simple formula thus: The grant to the ancestor *alone* gives him only an estate for life—his larger estate comes of the limitation to his heirs. This being so,

the limitation to the ancestor *expressly for life* was only what he would have taken by the operation of law but for the limitation to his heirs; and the Rule in Shelley's Case was only another form of expressing the same deduction—thus,

> "where an estate of *freehold* (which must be for life, at least) is limited to a person, and the same instrument contains a limitation to his heirs, or the heirs of his body, the word *heirs* is a word of limitation."

That is to say, that these limitations constitute an estate of inheritance in the ancestor. What is this but another form of expressing the legislative declaration as to how an estate of inheritance *should* be created? A limitation to the ancestor, which by the operation of law give him a freehold for life, which life estate, by the express authority of the act, was, by the subsequent limitation to his heirs, made an estate of inheritance in the ancestor. And so, in the case of Doe d. Long *vs.* Laming, where the devise was to A and the heirs of her body, the court treated the case as if the devise had been to the ancestress for life only, and because of the peculiar circumstances of the case the limitation to the heirs was treated as a remainder in fee to them.

We should be careful not to hold the courts of those times responsible for what appears in our day to be anomalous, if not absurd. The *times*, not the *judges*, are responsible for the decisions. If we feel disposed to indulge in criticism, our legislators might afford a fit subject for our shafts, for though the times have changed, they have not with them changed the law.

This analysis of the Rule in Shelley's Case shows that the conclusions of the law writers and the courts as to the effect of these engrafted words upon the limitation to the heirs, is philosophically and logically, as well as legally, inevitable.

Class III.

Under this class, we will consider the American cases, for the reason that, in some of them, the language of the wills would have made estates tail, if such estates had not been abolished by statute.

While we deem it altogether unnecessary to refer to the decisions of the State courts upon this question, yet as they accord with the authorities already cited as conclusive in this jurisdiction, it may not be unprofitable or uninteresting to explore these repositories of learning:

Massachusetts.—In the case of Buxton *vs.* Uxbridge, the devise was to son John and the heirs lawfully begotten of his body and their heirs and assigns. It was held that the first words gave an estate tail to John, and that the words, "their heirs and assigns," did not enlarge the devise to a fee simple, either to him or the heirs of his body.

10 Metcalf, 87, and cases cited.

New York.—In the case of Brown *vs.* Lyon, the devise was to C. H. to hold during her life, and then descend to the heirs of her body and their heirs and assigns forever. Held, that the devisee took an estate in fee in the premises.

6 N. Y. 419.

To the same effect are Brant *vs.* Gelston, 2 Johns Cases, 384, and Schoomaker *vs.* Sheeley, 3 Denio, 485.

Pennsylvania.—In the case of Carrol *vs.* Burns, the devise was to three daughters to have and to hold during their natural lives, and after their death to the lawful issue of the said three daughters, and the heirs and assigns of such issue. Held, the daughters took the estates tail.

108 Pa. St. 386.

There was a dissenting opinion in this case, three of the judges being of the opinion that the word "*issue*" in this

case was a word of purchase. The dissent does not affect the question in our case, as the words here are "heirs" and not "issue."

Maryland.—In the case of Simpers *vs.* Simpers, the devise was to A, and if A should have a son, then such son or heir male should have the property to him and his eldest heir male forever. It was held that the case was within the Rule in Shelley's Case.

16 Md. 160.

New Jersey.—In the case of Denn *vs.* Moore, the devise was to E. during her lifetime, and then to the heirs of her body and to her heirs' heirs forever. Held, an estate tail in E.

4 N. J. L. (1 South.), 309.

Ohio.—Devise to ancestors for life, and at their decease to descend to their heirs, to have and to hold to themselves, their heirs and assigns forever. Held, that under the Rule in Shelley's Case, the ancestors took a fee simple.

McFeely *vs.* Moore, 5 Ohio, 464.

Rhode Island.—Devise to E. and G. for and during the term of their natural lives, and after their death *equally* to their children, *their heirs and assigns forever.* Held, that under the Rule in Shelley's Case, E. and G. took estates in fee simple.

Petition of Browning, 16 R. I. 441.

We find that confirmation of this principle comes from the North and the South, the East and the West. In every one of these cases the question in this case was directly presented for consideration, and in every case it was held that the superadded words did not exclude the application of the Rule in Shelley's Case.

This brings us to the consideration of the principle governing the cases in the third class. It will be observed that

in the cases of the second class it has been contended that where the estate to the heirs of the first taker is an estate tail, and the superadded words create a fee simple, that this is such a difference in the qualities of the estates as makes the "heirs of her body" words of purchase. This contention was repudiated by the courts where estates tail were known to the law, but in those jurisdictions where there can be no estates tail, and where words which formerly created an estate tail now create an estate in fee simple, this question cannot arise. For example, in this case, the clause must be read as if in the following language: "To Martha Ann Mitchell during her natural life, and after death to her heirs and their heirs and assigns."

The estate tail never existed in this District. By the Acts of Maryland, 1782, Chap. 100, and 1786, Chap. 45, estates tail were abolished. The earlier decisions of the Court of Appeals of Maryland held otherwise; but in the year 1827, in the case of Newton *vs.* Griffiths, 1 H. & G. 132, these decisions were overruled, and in Posey's Lessee *vs.* Budd, the court held that "estates tail general were abolished in Maryland since 1786 by the operation of the act."

21 Md. 477.

In the case of Hill *vs.* Hill, 5 G. & J. (1833), the court held that what would have been an estate tail general before the act is converted by the Act into a fee simple.

So in Tongue *vs.* Nutwell, 13 Md. Rep. 424, it was held that a fee tail in that State under these acts amounts to a fee simple.

As has been remarked, the only ground upon which it was contended that superadded words in fee after a limitation to the heirs of the body of the ancestor converted these words into words of purchase, was that the ancestor took an estate tail, while the heirs of his body took an estate in fee simple, and therefore they could not take by descent from him, because they took an altogether different

estate—an estate which he never had, and therefore they could not take from him, but must take "*per formam doni.*" This contention was repudiated by the courts of England by unanimous consent.

But this question cannot arise at all in a jurisdiction where the words, "heirs of the body," and the word "heirs" create precisely the same estate. The highest court of Maryland has construed the Acts of that State passed before the cession of what is now the District of Columbia to the United States, and the Supreme Court of the United States will adopt its construction of those Acts.

It follows, then, that inasmuch as the words in Samuel DeVaughan's will, to wit, "to Martha Ann Mitchell and the heirs of her body lawfully begotten," would have vested in her a *fee simple*, and the superadded words, "and their heirs and assigns," create also a fee simple—therefore, the estates limited to the ancestor and to the heirs were not of different quality, but identically the same—the ground upon which the old contention was based is entirely wanting in this case.

We have thus far confined our investigation to the character of this very case, in which there is really but one question. We began the investigation with the postulate, that if the devise had been simply to Martha Ann Mitchell, during her natural life, and at her death to the heirs begotten of her body, that the Rule in Shelley's Case would have applied, notwithstanding the superadded words, "and to their heirs and assigns forever." This is conceded in the opinion of the Court of Appeals.

It is submitted that this proposition is almost mathematically demonstrated by the authorities cited. Indeed, the learned counsel for the appellees do not seem to controvert this proposition. On page 13 of their brief they incidentally refer to the fact of these superadded words as *evidence* of the intention to make Mrs. Mitchell's children the

root of a new line of inheritance, and they cite several cases as authority for this contention, but this does not appear to be the point upon which they rely.

They devote most of their brief to the discussion of the difference between a vested and a contingent remainder—a question which does not appear to be involved in this case.

We contend that Martha Ann Mitchell took an estate in fee simple, which lapsed by her death in the lifetime of the testator; and if this contention be correct, then there is no room for the discussion of the law of vested and contingent remainders. The learned counsel for the appellees insist that the devise gave only a life estate to Martha Ann Mitchell, and a remainder to her heirs. If this were so, the remainder would be essentially contingent, as every remainder limited to the heirs of a living person must be. Being a *contingent remainder*, with no particular estate to support it, it is void. They do not claim that the children take by way of executory devise, but that though the particular estate which supported the remainder to them never was capable of taking effect at all because of its lapse, and although the remainder to them could not take effect at the death of the testator because of the life estate to Susan Brayfield, who survived the testator, yet this remainder vested in them at the death of the testator!

If there was a remainder at all, it was contingent upon the determination of the particular estate, devised to Martha Ann Mitchell, in the lifetime of Susan Brayfield, upon the hypothesis that all the devisees survived the testator. The remainder was to take effect at and upon the happening of an event, to wit, the death of Martha Ann Mitchell. If it could not take effect then, because of the life estate of Susan Brayfield, it was as if the devise had been to Martha Ann Mitchell, and after the death of Martha Ann Mitchell and Susan Brayfield, remainder to the heirs of the body of Martha Ann Mitchell. In such a case, the

remainder is contingent, for as the particular estate upon which it was limited was the devise to Martha Ann Mitchell for life, but the remainder is not to commence until after the death of both Susan Brayfield and Martha Ann Mitchell, if Martha Ann Mitchell died before Susan Brayfield, the particular estate would end before the remainder could commence (which is very possible), and therefore such remainder is contingent.

Fearne, page 8.

In such case, because of the determination of the particular estate before the death of Susan Brayfield, the remainder would have been destroyed. But under the view we take of the case, this is all quite immaterial, and need not be further discussed.

We may therefore consider all of the long and able argument upon the difference between vested and contingent remainders as inapplicable to this case. Very ingeniously has the argument been introduced by the learned counsel for the appellees, for the purpose of introducing and giving color to what is their real contention, *which is simply this, that the Rule in Shelley's Case does not apply to this devise*, not because it is a vested remainder, nor because of the superadded words, but because under the decisions cited by them, the word "heirs" must be read as *children*.

This being their real contention, they begin their argument in support of it by referring to the case of Daniel *vs.* Whartinby, as the law of this jurisdiction. Let us follow their citations, case by case. What was decided in that case? Bear in mind that the words of this devise are "*heirs of the body*," not "heir," nor "children," nor "descendants," nor "issue," nor "heirs of the body begotten by a *particular husband*," but *generally* to heirs of her body begotten.

Now, what was the ground of decision in the case of

Daniel *vs.* Whartinby? At page 642 et seq., the court lays down the law thus:

> "In construing wills, where the question of its application [the Rule in Shelley's Case] arises, the intention of the testator must be fully carried out, so far as it can be done *consistently* with the rules of law, *but no further. The meaning of this is*, that if the testator has used *technical language*, which brings the case within the rule, *a declaration, however positive*, that the rule shall not apply, or that the estate of the ancestor shall not continue beyond the primary express limitation, or that his heirs shall take by purchase and not by descent, will be unavailing to exclude the Rule in Shelley's Case. The word *issue* is not *ex vi termini*—within the Rule in Shelley's Case. It depends upon the *context* whether it will give an estate tail to the ancestor."

And then the court proceeds to show how the context of the will in that case enables it to construe "*issue*" as a word of purchase.

This is the law of this jurisdiction, and there is nothing uncertain, equivocal or ambiguous in the terms in which it is declared by the Supreme Court.

The words used in this will are technical and *ex vi termini* within the Rule in Shelley's Case. The counsel for the appellees contend that notwithstanding this is true, yet implications, inferences drawn from the *context* must control them, while the Supreme Court admonishes us that an *express declaration* in the context, *however positive*, either that the rule shall not apply, or that the estate of the ancestor shall not continue beyond the primary express limitation, or that his heirs shall take by purchase and not by descent, will be unavailing for that purpose.

We confidently submit that the decision in the case of Daniel *vs.* Whartinby utterly demolishes all of the arguments of the learned counsel, and overrules every case upon which they rely.

We, then, boldly take this position, namely, when technical words are used in a devise, as in this case, neither the implied nor the express intention clearly appearing in the context of the will, will prevent the application of the Rule in Shelley's Case *in this jurisdiction*. There are jurisdictions in which this is not the law, but here it is the law.

There have been decisions holding that technical words may be controlled by the use of other words in the context, such as—

1st. "Share and share alike."

2d. "As tenants in common."

3d. "Whether sons or daughters."

4th. "Without regard to seniority of age or priority of birth."

This case, even if "*nova res*" in this jurisdiction, would not be affected by these decisions. In England, Jesson *vs.* Wright overruled them all. And this is all that need be said upon this point. There is another class of cases in which technical words were NOT USED, in which the context has been permitted to construe the words used.

Of such are the cases cited by the counsel for the appellees. Let us examine the authorities cited by them.

In the case of Jones *vs.* Miller, 13 Ind., the language was "heir," in the singular number. In Ridgeway *vs.* Lamphear, 99 Ind., the word was "children." In Millett *vs.* Ford, 109 Ind. 159, the words were "heirs of the body begotten in lawful wedlock, and *none others*." In Jenkins *vs.* Jenkins, 96 N. C. 257, the devise was to the *use* of the devisee for life, remainder to his heirs. In Butler *vs.* Huistis, 68 Ill. 594, the devise was during natural life, with remainder *and fee* thereof to the heirs of his body. Strong *vs.* Goff, 11 East, 668, was overruled in England. In Fulton *vs.* Harmon, 44 Md. 253, the devise was to a "*son*" during his natural life, and after his death (not the property, but) the proceeds thereof to be equally divided between the son's lawful heirs, in a manner prescribed and

inconsistent with the law of descent. In Croxhall vs. Shererd, 5 Wall. 268, the words were "heirs of her body by her *present husband* lawfully begotten," and besides, the decision was controlled by a statute of New Jersey. Hentzleman's Appeal, 136 Pa. St. 142; Ernhardt *vs.* Ernhardt, 127 Ind. 597, and Leake *vs.* Watson, 21 Atl. Rep. 1075, manifestly have no bearing upon the question under consideration. In Green *vs.* Green, the decision was upon the ground that the limitation to the ancestress was of an equitable estate, and that to her heirs was of a legal estate.

As we have seen, the case of Daniel *vs.* Whartinby is the law of this jurisdiction. That case lays down the law to be, that when technical words are used in the devise they cannot be controlled by other expressions of the testator's *intention*, however express and positive; and this is altogether consistent with the rule, expressed by some authorities in general terms, thus: "But it is not to be inferred from the preceding cases, that the words 'heirs of the body,' are incapable of control or explanation by the effect of *superadded expressions*, clearly demonstrating that the testator used *those words* in some other than their ordinary acceptation, and so descriptive of another class of objects." "Where the words in question are *accompanied* by such an explanatory context, the devise is to be read as if the terms which they are explained to mean were actually in the will." *In such cases, technical words are not in fact used*, and the rule agrees with the rule laid down in Daniel *vs.* Whartinby.

For example, a devise to the "heirs of the body"—that is to say, to "sons"—that would be a devise to the sons, and not to the heirs. This is clearly shown by the cases in which this rule has been applied.

In the case of Lowe *vs.* Davis, 2 Lord Raymond, 1561, the devise was to B. and his heirs lawfully to be begotten —*that is to say*, to his first, second, third and every *son and sons* successively, lawfully to be begotten of the body of

B. This was technically a devise to the *sons* begotten of the body of B.

Such, also, was the case of Lisle *vs.* Gray, 2 Lev. 223, where real estate was devised to the first "*son*" of the body of E., and the "heirs male of the body of the first son" (with limitations carried to the fourth son), "*and so*" *to all and every other the heirs male* of the body of E., respectively and successively, etc., it was held that the words "and so," etc., explained the words "heirs male" in the latter part of the clause to mean *sons*, the word used in the former part of the clause

The case of Goodtitle, dem. of Sweet, *vs.* Herring, 1 East, 264, is of the same class. That was a devise to the "heirs male" of the body of A. to be begotten, "the elder of such *sons* and the heirs male of his body . . . always to be preferred to the younger of such sons," etc., and in default of the issue of such sons, "to the daughters," etc. Here the words "such sons" qualified the words "heirs male" so as make them "sons."

In the light of these decisions, and of reason, we are justified in saying, as the Supreme Court of the United States said in Daniel *vs.* Whartinby, that if technical words *are used*, nothing can control their effect; but that technical words, when explained by the testator to be used as meaning words not technical—that is to say, when the context is an explanation of the *testator's language*, and not of *his intention*, then the devise must be read as if the technical words were not used at all, because in a legal sense they are not used.

We have reserved for our latest consideration the effect of the words, "share and share alike," used in this devise as to square four hundred and eighty-three. These words are not used in the devise of the property in square three hundred and seventy-eight. Having demonstrated, as we respectfully submit, that the devise without these words vested a fee simple in Martha Ann Mitchell, which lapsed

by reason of her death in the lifetime of the testator, let us now consider the effect of these words.

The learned counsel for the appellees, on page 31 of brief, treats these words as if synonymous with "tenants in common," and refer to the case of Strong *vs.* Goff, where the words used were "tenants in common," as authority—the only English case in which it was held that such words prevented the application of the Rule in Shelley's Case. It will be observed that the superadded words, "their heirs and assigns," were not used in the devise in that case. As we have said, this case has been distinctly overruled by the highest authority.

But it never could have been the law in this jurisdiction upon the very reasoning used by the learned chancellor who decided the case; which was that, as in England, the sons took successively, when they took by *descent*, and could not take together as tenants in common, *therefore* the testator must have used these words as words of *purchase*. In this jurisdiction, inasmuch as the *reason* never existed, the law could never have obtained.

The courts of this District have repeatedly held that the use of the words, "as tenants in common," and "share and share alike," does not prevent the application of the Rule in Shelley's Case.

In England, the cases in which the words, "share and share alike," and "as tenants in common," were held to take the case out of the rule, were overruled by the highest court of the realm, and as we have seen, never could have had any effect with us, because our law of descents is "share and share alike."

Lest we might be liable to the suspicion of a want of entire frankness in the discussion of this interesting case if we failed to call the attention of the court to a case in which the language is almost identical with the language of this devise in respect to square four hundred and eighty-

three, we now invite attention to that case. We refer to the case of Right *vs.* Creber, in which a testator devised as follows: "To trustees and their heirs, *in trust* to permit his daughter I. and her assigns to receive the rents for her life free from her husband, and after her death to the heirs of the body of his daughter, share and share alike, their heirs and assigns forever."

This case is frequently cited as having decided that the Rule in Shelley's Case did not apply so as to give the daughter an estate tail. The fact is, that question was not even presented for consideration. The Rule in Shelley's Case could not have applied, for the simple reason that an equitable estate was devised to the daughter, while a legal estate was devised to the heirs of her body. The court held that the words, "heirs of her body," meant "children," not to defeat the Rule in Shelley's Case but for the purpose of declaring how the *children* should take as between themselves! It was identical with Green *vs.* Green, 23 Wall., and Ware *vs.* Richardson, 3 Md. 55.

It was conceded that the daughter took only an estate for life—the question controverted was, who were entitled to the remainder? If the "heirs of her body" were taken in their technical sense, then they only who were in a technical sense the heirs of her body could take the remainder; whereas, if "heirs of the body" were to be read as if the word "children" had been used in the devise, then all the children would take, and the only question decided in that case was that the "child in being at the time of the testator's death took a vested remainder in fee which opened to let in the after born *children*."

5 Barn. & C., 866.

Attention is called to what was decided in that case because in it the effect of *superadded words* to qualify technical words, in exclusion of the Rule in Shelley's Case, was not presented for discussion or decision. It was simply

an ordinary case of ascertaining the intention of a testator, free from the embarrassment arising from a conflict between technical words and the intention gathered from the context, under the Rule in Shelley's Case. If there had been such a decision as it is cited as being, it would have been in the teeth of Jesson *vs.* Wright, and would have been overruled by the later case of Doe *vs.* Featherstone, 1 Barn. & Adol., 944.

Let us now consider the terms of this devise as a whole. We have found that, neither the superadded words, "share and share alike," if they had been the only words superadded, nor the superadded words, "and their heirs and assigns," if they had been the only superadded words, would have prevented the application of the Rule in Shelley's Case. The only question left for consideration is, does the concurrence of these two classes of superadded words in this devise take it out of the rule? There is nothing cumulative in them. They stand alone as to their meaning and effect. The use of the one adds nothing to the effect of the other. "*Ex nihilo, nihil fit.*" It is equally true that if nothing be added to nothing, the product must be nothing.

We have cited an American case in which there is a concurrence of these two classes of superadded words, and in which it was held that the Rule in Shelley's Case applied.

16 R. I. 441.

It is instructive to compare the case of Sisson *vs.* Seabury, 1 Sumner, 247, with Schoomaker *vs.* Sheeley, 3 Denio, 485.

In the former case, Mr. Justice Story lays down the rule as declared by the Supreme Court, in Daniel *vs.* Whartinby, and distinctly puts his decision upon the ground that technical words were not used in the devise. In the latter case, (identical with this case) the court, by a vote of fifteen to six, held that the Rule in Shelley's Case applied, and discriminated the case from that of Sisson *vs.* Seabury, because technical words were not used in that case.

This case, made on the brief of the appellant, was not satisfactory to the Court of Appeals, and for the reasons set forth in the opinion of the court, their decision was adverse to the appellants. 3 Appeal Cases, District of Columbia, p. 50.

We respectfully submit a brief review of that opinion. The question of vested and contingent remainders, so elaborately argued by the learned counsel for the appellees, seems to have been disregarded by the court, and the decision placed solely upon the ground that the superadded words in the devise so controlled the technical words used by the testator as to exclude the Rule in Shelley's Case. In the opinion the case is stated as follows:

> "We have in this devise in express terms—
>
> 1st. A devise to the daughter for her natural life.
>
> 2d. At her death the property directed to be equally divided among the heirs of her body begotten, share and share alike; and
>
> 3d. With words of limitation added, appropriate to limit a fee simple estate in the heirs of the body, *if these latter words be read as equivalent to children.*"
>
> Page 54.

The court proceeds to read them as equivalent to children and hence the decision.

At page 56 the opinion concedes that—

> "the devise to Mrs. Mitchell for her life, and then to the heirs of her body, without more, would unquestionably have passed an estate tail, at the common law, to Mrs. Mitchell; but the effect of the superadded words of limitation of heirs generally to succeed the heirs of the body, directed a different course of descent, according to the principles of the common law."

Having announced this conclusion, the Court of Appeals

proceeds to state what principles of the common law justify the conclusion; the first being that—

> "It is certainly a well settled principle in the law of real estate, indeed as well settled as the Rule in Shelley's Case itself, that where an estate is expressly devised to a person for life with remainder to the heirs of his body, *and there are words of explanation annexed to such word heirs from whence it may be collected* that the testator meant to qualify the meaning of the word *heirs* and not to use it in a technical sense, etc."

and the second that—

> "In the construction of wills the rule is paramount that the intention of the testator must prevail unless it clearly conflicts with some settled rule of law that will not give way to that intention. In arriving at the intention of the testator we must read the whole will together, etc." (Page 53.)

These principles, as they have been illustrated by the courts which established them, may be conceded to be correctly stated in the opinion, although the generality of the expression is somewhat involved.

This may be conceded, to wit, that if there *are words annexed to the word heirs*, by the testator explanatory of the word heirs—that such words may be considered for the purpose of ascertaining what the testator meant by the use of the word heirs—but no other parts of the will can be looked to for such explanation.

It may be also conceded that if the term used is not "heirs," which *ex vi termini* is a word of limitation—then the case is not within the Rule in Shelley's Case *per se*, and the four corners of the will may be looked to for the purpose of ascertaining the testator's intention. It may be further conceded, that if there are words annexed to the word heirs, which explain that the testator used those words as explanatory of the word heirs—that then the whole will is

open to research for the purpose of ascertaining the testator's intention.

This brings us to this question: Are the superadded words in this devise, annexed to the word heirs, and clearly explanatory that the testator meant children and not heirs? In other words, is there any recognized authority anywhere which holds that when the testator uses the technical word "heirs" that the addition of the words, "and their heirs and assigns forever, equally," are so explanatory of his intention to use heirs or children as to exclude the Rule in Shelley's Case? For unless these superadded words make the word heirs equivalent to the word children, the Court of Appeals does not claim that its decision is correct. Let us look at the authorities cited in the opinion.

The first case is Doe *vs.* Laming, 2 Burr. 1100. That case was not within the Rule in Shelley's Case in any respect whatever because it was not a case of devise to the ancestor for life with remainder to her heirs—but a devise in fee simple, that is to the ancestor and her heirs.

Lord Mansfield, explained, that this being a devise of gavelkind lands, the devise could not take effect at all but must be absolutely void unless the heirs took as purchasers, and further that the word *heirs* in the plural in the case of gavelkind lands, answered to the term heir in the singular in the common case of lands not gavelkind, and further still, that the testator mentioned females not only expressly and particularly, but even prior to males, and that it was clear that he did not mean that the land should go in a course of descent in gavelkind, and for these reasons he was constrained to do violence to the express language of the will. Is there any analogy between that case and this? We have no gavelkind tenant. His Lordship did not hold that these added words were annexed to the words "heirs of the body" and explained the use of the words "heirs of the body." He places his decision wholly upon the

grounds that preclude the possibility of its being any authority in this case. It is no marvel that the case of Doe, d. Long, *vs.* Laming stands alone, and has been again and again repudiated by the courts of England.

The case of Bagshaw *vs.* Spencer was the case of an executory trust, and the decision was solely on that ground, it being the settled law that the Rule in Shelley's Case does not apply to executory trusts.

The next case cited in that opinion is that of Right *vs.* Creber, to which the Rule in Shelley's Case was not applicable because the life estate was legal and the remainder equitable, and it has long been the law that the Rule in Shelley's Case does not apply when the life estate and the remainder are not of the same character.

How can such a case be authority in this? The next English case cited is Jesson *vs.* Wright, which the opinion describes "as the great and leading case in English real estate law," and which is the last analysis of the Rule in Shelley's Case in England.

Now what was that case? The court and the House of Lords held: That the superadded words in that case did not exclude the Rule in Shelley's Case. The testator devised certain real estate to W. for the term of his natural life—he keeping the buildings in tenantable repair (an incident of an estate for life only)—then to the heirs of the body of W. lawfully begotten, share and share alike as tenants in common (impossible if they hold as heirs), and if but one *child* (a word of purchase) the whole to such only *child*, and for want of such "issue" (a word of purchase) then over.

We find in that case all the superadded words that are in this case, except the words "and to their heirs and assigns forever." And we find in that case words which are applicable only to a life estate, and the words child and issue—words of purchase—which are not in this case.

May we not confidently submit that the superadded words

in that case were more controlling than those used in this case, as expressive of the testator's intention to limit a life estate, and that if we use the words "child" and "issue" in connection with the words "share and share alike, as tenants in common," were they not more explanatory of the word heirs than the words share and share alike, as tenants in common, without the use of the words child and issue, which are not used in that case?

And yet in that "great and leading case" the court of last resort in England held, that the Rule of Shelley's Case applied, and that he took an estate tail. *This was the decision.*

The opinion does not state what the decision was, but simply refers to the principles enunciated by the Judges. Well, we do not object to the principles. We cannot controvert their soundness, since upon them was based the decision in our favor.

Now, let us compare the language of that decision with the decision of Daniel *vs.* Whartinby by this court.

Lord Eldon said:

> "If he [the testator] had stopped at the end of the first devise to W., it was clear that he was to take for life only; if at the end of the first following words, 'lawfully issuing,' he would, notwithstanding the express estate for life, be tenant in tail, 'and in order to cut down this estate' it is absolutely necessary that a particular intent should be found to control and alter it, as clear as the general intent here expressed. The words 'heirs of the body' will, indeed, yield to a particular intent that the estate shall be only for life, and that may be from the effect of the superadded words, or any expressions showing the particular intent of the testator, *but that must be clearly intelligible and unequivocal.*'"

His lordship then weighs the argument based upon the use of the words "child" and "issue," and the words "share and share alike as tenants in common," to show a particular intent paramount to the general intent expressed in the

word "heirs," and concluded that these words were insufficient for that purpose.

And Lord Redesdale said: "All the cases but Doe *vs* Goff decide that the latter words, "share and share alike, as tenants in common," unless they contain a clear expression, or necessary implication of some intent contrary to the legal import of the former, are to be rejected.

"That the general intent should overrule the particular is not the most accurate expression of the rule of decision. *The rule is that technical words shall have their legal effect unless from subsequent inconsistent words it is very clear that the testator meant otherwise. . . . This only follows, that having given to heirs of the body, he could not modify that gift in the two different ways which he desired, and the words of modification are to be rejected.*" "The words of 'for want of such issue' are far from being sufficient to overrule the heirs of the body." "*The defendants in error interpret heirs of the body to mean children only* and then say that the limitation over is in default of children, but I see no grounds to restrict the words 'heirs of the body' to mean children in the will."

In this case neither the word "children" nor "issue" is used, and yet the Court of Appeals relies upon the case of Jesson *vs.* Wright to sustain them, construing the word "heirs" used in this will to mean "children."

The court in Daniel *vs.* Whartinby has affirmed the case of Jesson *vs.* Wright in unmistakable terms. This is the language used:

> "In construing wills, when the question of the application of the Rule in Shelley's Case arises, the intention of the testator must be fully carried out, *so far as it can be done consistently with the rules of law. The meaning of this is that if the testator has used technical language which brings the case within the rule, a declaration, however positive, that the rule shall not apply, or that the estate of the ancestor shall not continue beyond the primary express limitations, or that his heirs shall take by purchase and not by descent, will be unavailing to exclude the rule, and cannot affect the result.*"

This is substantially what the court said in Jesson *vs.* Wright. Continuing—

> "*But if there are explanatory words and qualifying expressions, from which it appears that the import of the technical language is contrary to the clear and plain intent of the testator, the former must yield, and the latter will prevail.*

This is also substantially what the court said in Jesson *vs.* Wright. But the court adds one sentence which expresses the entire law. "*The rule is one of property and not of intention.*" In other words, it is what have you done—not what you desired to do.

The court then proceeds to declare that the word in the will under consideration being *issue* and not *heirs*, was more flexible, and cites cases in which this word was used.

All of these citations are of cases in which technical words were not used, or in which when used were held by virtue of explanatory words annexed to be equivalent to children or issue.

This brings us to the consideration of the very ground upon which the Court of Appeals bases its decision, as expressed in the opinion; that is to say that, when the testator uses the technical words "heirs of the body," and adds thereto the words "and to their heirs and assigns forever," these added words are a sufficient explanation of the technical words heirs of the body to exclude the Rule in Shelley's Case.

This court did not so hold in Daniel *vs.* Whartinby, for these superadded words were used by the testator in that case, and were held to be explanatory of the general intent, because in the declaration of that general intent the testator used the word "issue," which is not *ex vi termini*—a word of limitation—and, therefore, more flexible to modification by explanatory language. This court did not say that if the technical word had been used the decision would have been different, because that would have been obiter; but the inference to that effect is irresistible.

The authorities hereinbefore cited from English and American decisions adjudge that the superadded words in *this will* are not sufficient to modify or qualify the technical words "heirs of the body."

The same courts which established the rule that the word heirs may be explained by *words* annexed thereto, which show that the testator did not use the technical words in a technical sense, have also adjudged what added words will be construed to effect that result. The annexed words must explain *the language*—not *the intent*. The three cases decisive of this question, hereinbefore cited, are Lowe *vs.* Davis; Goodtitle, dem. Sweet, *vs.* Herring, and Lisle *vs.* Grey.

It remains only to refer to the only case in which the superadded words "and to their heirs forever," will exclude the application of the Rule in Shelley's Case. Upon this point the authorities agree. When the superadded words of limitation describe a different estate from that limited to the heirs of the devisee for life—such as a devise to A for life, and after her death to the heirs of her body, and the heirs of their body *in tail male or female*. As this estate is entirely different from that of the intermediate takers—the objects of the ultimate limitations must take as purchasers, because they cannot take by descent. They take an estate not *included in the prior limitation*.

In conclusion, let us sharply present the distinction which has, by the obscurity of its presentation, caused all the doubt and difficulty which embarrass the application of the Rule in Shelley's Case.

This devise is to Martha Ann Mitchell during her natural life, and after her death to the "heirs of her body lawfully begotten," etc. It is beyond controversy true, that if the testator had, after using this technical language, continued as follows: "My intention being that Martha Ann Mitchell shall take only a life estate, and that the heirs of her body shall take by purchase and not by descent," the devise would have been within the Rule in Shelley's Case.

If, however, the devise had been to Martha Ann Mitchell during her natural life, and after her death to the heirs of her body lawfully begotten—that is to say, to her children lawfully begotten—the Rule in Shelley's Case might not have applied.

Or, to state the law in another form—if the testator uses the technical language, which the law declares shall create an estate of inheritance in the ancestor, it matters not whether the testator used that language defiantly or ignorantly, the result is the same. The fiat of the law is inexorable. It matters not how unreasonable that fiat, or how unjust, or how monstrous. Let its atrocity be so great as to merit the "*anathema maranatha;*" yet it is the law, the injustice and hardship of which the courts have no power of mitigating.

Congress alone can afford relief; and in this, as in all other cases, the best way to insure the repeal of a bad law is to enforce it.

Respectfully submitted.

H. O. CLAUGHTON,
CHAPIN BROWN,
Solicitors for W. H. DeVaughan and others,
Heirs of John DeVaughan.

165-566

SUPREME COURT, U. S.
FILED
OCT 30 1896

165-566

IN THE

Supreme Court of the United States.

October Term, 1896.

No. 114.

JAMES H. DeVAUGHN et al., Appellants,

vs.

SARAH W. HUTCHINSON et al., Appellees.

Appeal from the Court of Appeals of the District of Columbia.

Brief on Behalf of Appellees.

By JEREMIAH M. WILSON,
A. A. HOEHLING, JR.,
Attorneys for Appellees.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1896.

JAMES H. DE VAUGHN and EMILY DE VAUGHN, his wife; MARY R. PORTER and JAMES B. PORTER, her husband; GEORGE E. KIRK, *et al.*, Appellants,

vs.

SARAH W. HUTCHINSON and JOHN B. HUTCHINSON, her husband; BENJAMIN D. V. MITCHELL and RICHARD G. MITCHELL, Appellees.

No. 114.

Appeal from the Court of Appeals of the District of Columbia.

Brief for Appellees.

Statement and Pleadings.

The bill of complaint in this case was filed on behalf of those claiming to be the heirs-at-law of Samuel De Vaughn, who died in the District of Columbia on the 5th of July, 1869, leaving a last will and testament, dated April 20, 1861. (*R., pp. 1–9.*) This will was admitted to probate about September 1, 1867, and a copy is set forth as an exhibit to the bill. (*R., pp. 9–11.*)

The testator died leaving a large estate, situate in the District of Columbia, disposed of by him as set forth in said will. Among other provisions therein contained, and under which the present litigation arose, is the following (*R., p. 10*):

"ITEM. *I give and devise unto my sister, Susan Brayfield, the whole of square four hundred and eighty-three and improvements; also, lots twenty, twenty-one, and part of lot twenty-two in square three hundred and seventy-eight*, situated in the city of Washington, *during her natural life, and at her death to her daughters*, Mary Rebecca Brayfield, Catherine Sophia Harrison, and *Martha Ann Mitchell, to be divided in the following manner, that is to say: Martha Ann shall have one-half of lot twenty, as subdivided, being seventy-three feet deep, having on the same two houses;* to Catherine Sophia the other half (being the east half) of said lot twenty, having also on the same two houses, and Mary Rebecca shall have the corner store situated on lot twenty-one; Catherine Sophia shall have the two houses next, south of the said corner store on said lot twenty-one, *and Martha Ann shall have the next two houses south of the two to Catherine Sophia, and adjoining the same on said lot twenty-one*, and Mary Rebecca shall have the whole of that part of lot twenty-two, as subdivided from lot twenty, and improvements, *during their natural lives, and after their death to their heirs begotten of their bodies, and to their heirs and assigns forever.*

"*I also desire that square four hundred and eighty-three* shall be subdivided at the death of my sister, Susan Brayfield, and *distributed* as follows: Mary Rebecca Brayfield shall have the whole front on K street, ninety feet deep to a ten-foot alley, which comprises lots one and two, with all improvements on the same; *Martha Ann Mitchell shall have ninety feet on Sixth street, running that breadth through the square to Fifth street*, and Catherine Sophia Harrison shall have the remainder north portion of said square four hundred and eighty-three, *during their natural lives, and at their death to be equally divided among the heirs of their bodies begotten, share and share alike, and to their heirs and assigns forever.*"

Mrs Susan Brayfield, the life tenant, died in said District on the 3d of December, 1891. Mrs. Martha Ann Mitchell, one of the daughters of Mrs. Brayfield, and one of the devisees in remainder named in the said will, died some time in the year 1866, before the death of the testator, Samuel DeVaughn, leaving her surviving, as her only children and heirs-at-law, Benjamin D. V. Mitchell, Richard G. Mitchell, and Sarah W. Hutchinson (appellees herein).

The bill is filed for the partition and sale, among the heirs-at-law of Samuel DeVaughn, of the real estate and property so devised, in remainder, to Mrs. Mitchell, upon the theory that Mrs. Mitchell took an estate in fee-simple under the devise by the operation of the rule in Shelley's case, and that, as she predeceased the testator, the devise lapsed and reverted to the estate of the said Samuel DeVaughn.

To said bill a demurrer was interposed on behalf of the said children of Mrs. Mitchell (appellees herein), this upon the theory that Mrs. Mitchell took but an estate for life in the property so devised, subject, however, to the prior life estate in Mrs. Susan Brayfield, and that the ultimate remainder in fee vested in such children as devisees, by purchase, and that there was, therefore, no lapse of the devise upon the death of Mrs. Mitchell (*R., pp. 12, 13*). The said demurrer was sustained by the trial court, and the equities of the case were adjudged to be with the children of Mrs. Mitchell, the demurrants, and the dismissal of the bill was decreed. (*R., pp. 14, 15.*)

From this decree an appeal was taken in open court to the General Term thereof (*R., p. 15*), and thereafter transferred to the Court of Appeals of the District of Columbia, where the decree of the court below was affirmed. (*See* Opinion by Mr. Chief Justice Alvey, *R., pp. 16–21;* Decree, *R., p. 22.*)

From that decision an appeal was duly allowed to this court. (*R., p. 23.*)

BRIEF.

I.

Vesting of Estates Favored by the Courts.

Our first proposition is that, as between vested and contingent remainders, and as between vested remainders and the defeat of estates in remainder, by the application thereto of the rule in Shelley's case, the law favors vested remainders, and will never defeat a remainder by making it to be contingent, or by bringing it within the rule in Shelley's case, where, *by any permissible rule of interpretation*, that can be avoided.

Although this proposition is exceedingly elementary and thoroughly established, especially in the American law of real property, yet, owing to the importance of the rule as applied to the present case, we may be permitted to present a few of the authorities so holding.

In *Croxall* v. *Shererd* (5 Wall., 287), this court says:

"The struggle with the courts has always been for that construction which gives to a remainder a *vested* rather than a contingent character. A remainder is never held to be contingent when, consistently with the intention, it can be held to be vested. *If an estate be granted for life to one person, and any number of remainders for life to others in succession, and finally a remainder in fee simple or fee tail, each of the grantees of a remainder for life takes at once a vested estate, although there be no probability, and scarcely a possibility, that it will ever, as to most of them, vest in possession.*"

Citing, *Williams on Real Property*, 208.

In *Doe* v. *Considine* (6 Wall., 475) the court says:

"The law will not construe a limitation in a will into an executory devise when it can take effect as a remain-

der, nor a remainder to be contingent when it can be taken to be vested. It is a rule of law that estates shall be held to vest at the earliest possible period, unless there be a clear manifestation of the intention of the testator to the contrary."

Citing, in the note, a large number of American authorities.

The same thing is repeated in many of the succeeding decisions of this court, some of which will, in other connections, be presented.

In *4 Kent's Commentaries* (s. p., 203), the author states the rule thus:

"The law favors *vested* estates, and no remainder will be construed to be contingent which may, consistently with the intention, be deemed vested, * * * and yet (notwithstanding) it is uncertain whether B may not die without heirs of his body before the death of A, and so the remainder never take effect in possession," etc.

See, also, the same thing in—

Linton v. *Leycock*, 33 Ohio St., 134;
Moore v. *Lyons*, 25 Wend., 119.

This rule for the interpretation of wills is an established one.

II.

Lapse of Devise to First Taker Defeats Rule in Shelley's Case.

Our next proposition we state thus: Where a devise is to one for life, with a limitation over to the heirs of such first taker, in language which would bring the devise within the rule in Shelley's case, and it happens that such first taker is dead at the time the will takes effect, there the rule in Shelley's

case does not apply, because, in that case, the heir can not take by descent, since the ancestor never had in him (Mrs. Mitchell in the present case) any descendable estate.

In a most clear, full, and exhaustive discussion of the rule in Shelley's case, as found in *4 Kent's Commentaries*, (s., p. 220, *et seq.*), the author states our present proposition, and also one to which we shall presently come, in the following words:

"There are several cases in which, in a devise, the words 'heirs' or 'heirs of the body' have been taken to be words of purchase, and not of limitation, in opposition to the rule in Shelley's case. (1) *Where no estate of freehold is devised to the ancestor, or he is dead at the time of the devise. In that case the heir can not take by descent when the ancestor never had in him any descendable estate.* It is the same thing if the ancestor takes only a chattel interest by the devise; for if there be no vested estate of freehold interposed between the term of the ancestor and the estate of his heirs, the latter can take only by way of executory devise; and if there be such a vested estate, the contingent remainder to the heir is supported by the intermediate estate, and not by the chattel interest of the ancestor." (Citing *Sir Thomas Tippen's Case*, cited in 1 P. Wms., 359; Co. Litt., 319 b.) "(2) *Where the testator annexes words of explanation to the word 'heirs,' as to the heirs of A now living, showing thereby that he meant by the word 'heirs' a mere descriptio personarum, or specific designation of certain individuals*" (citing *Burchard* v. *Durdant*, 2 Vent., 311; Carth., 154, s. c.); "*or where the testator superadds words of explanation, or fresh words of limitation, and a new inheritance is grafted upon the heirs to whom he gives the estate. Thus it is in the case of a limitation to A for life only, and to the next heir male of his body, and the heirs male of such heir male; and in the case of a devise of gavelkind lands to A, and the heirs of her body, as well female as male, to take as tenants in common. In such cases it appears that the testator* INTENDED *the heirs to be the root of a new inheritance, or the stock of a new descent, and the denomination of 'heirs of the body' was merely descriptive of the persons who were intended to take.*"

Citing—

Archer's Case, 1 Co., 66;
Case put by Anderson in Shelley's Case, 1 Co., 95 b.;
Lisle v. *Gray*, 2 Lev., 223;
Ludington v. *Kime*, 1 Ld. Raymond, 203;
Blackhouse v. *Wells*, 1 Eq. Cas. Abr., 184, pl. 27;
King v. *Burcel*, Amb., 379;
Goodright v. *Pullyn*, 2 Ld. Raymond, 1437; approved in *Doe* v. *Considine*, 6 Wall., 473;
Wright v. *Pearson*, 1 Eden, 119;
Doe v. *Laming*, Burr, 1100;
Perrin v. *Blake*, (Blackstone's Argument), Harg. Law Tracts;
Brant v. *Gelston*, 2 Johns. Cas., 384.

See, also, the same rule stated by this court in the case of *Robinson* v. *Portland Orphan Asylum* (123 U. S., 703, 708), as follows:

"The fact that Ann Smith and Eleanor Cummings Robinson died before the testator, whereby the legacy to them lapsed altogether, is not material, because *if property be limited upon the death of one person to another, and the first donee happen to predecease the testator, the gift over would, of course, take effect notwithstanding the failure, by lapse, of the prior gift.*"

The same thing is expressly held in *Henderson* v. *Henderson* (64 Md., 185), in a case quite analogous to the one at bar. See, also, *Pennington* v. *Pennington* (74 Md., 418).

III.

Technical Sense of the Word Heirs, Controlled by Context.

Our next proposition is as follows: A testator, according to the modern American doctrine, applicable to the rule in Shelley's case, has a right to affix to the word "heirs," or the words "heirs of his body," or "heirs begotten of his body,"

his own meaning; and if he has superadded to the word "heirs," etc., words that show that he did not use them in their technical sense, in the view applied by the rule in Shelley's case, and if the entire will clearly shows that he used the words "heirs," or "heirs of his body," or "heirs of his body begotten," in the sense of the word "children," and that he meant that they should, after the termination of the estate to the first taker, take as purchasers, then that meaning will be given by the courts to the word heirs, and the rule in Shelley's case will not be applied.

This proposition is stated in *4 Kent's Commentaries, 221*, where the author, in stating the class of cases where the words "heirs," or "heirs of the body," have been taken to be words of purchase and not of limitation, in opposition to the rule in Shelley's case, states as follows:

"Where the testator annexes words of explanation to the word 'heirs,' as to the heirs of A now living, showing thereby that he meant by the word 'heirs' a mere *descriptio personarum* or specific designation of certain individuals.

"*Or where the testator superadds words of explanation, or fresh words of limitation, and a new inheritance is grafted upon the heirs to whom he gives the estate.* Thus it is in the case of a limitation to A for life only, and to the next heir male of his body, and the heirs male of such heir male; and in the case of a devise of gavelkind lands to A, and the heirs of her body, as well female as male, to take as tenants in common. In such case it appears that the testator *intended* the heirs to be the *root of a new inheritance*, or the stock of a new descent, and the denomination of 'heirs of the body' was merely descriptive of the persons who were intended to take."

Citing,

Archer's case, 1 Co., 66;
Lisle v. *Gray*, 2 Lev., 223;
Luddington v. *Kime*, 1 Lord Raymond, 203;
Blackhouse v. *Wells*,, 1 Eq. Cas. Abr., 184, pl. 27;
Doe v. *Laming*, 2 Burr. Rep., 1100

Although Mr. Jarmyn is a partisan on the "Shelley rule" side of the celebrated professional controversy over the rule in Shelley's case, as it prevailed for ages in England, as his work on wills clearly shows, yet even *he* states the rule which we have just quoted from Kent (see the 5th edition of his work, s. p. 362–3, top p. 363) in these words:

"But it seems that if the superadded words of limitation operate to change the course of descent, *they will convert the words on which they are engrafted into words of purchase, as in the case of a devise to a man for life, remainder to his heirs, and heirs female of their bodies.*"

Citing,

Anderson in Shelley's Case, 1 Co., 95 b.

In *2 Washburn on Real Property* (5th edition), the author says, at page 654:

"Thus the words 'child' or 'children' are in their *usual* sense *words of purchase, and are always so regarded unless the testator has unmistakably used them as descriptive of the extent of the estate given and not to designate the donees.* But they may be used as words of limitation. On the other hand, *heirs may sometimes mean the same as child or children*, but the testator's intent to use it thus must be clear, and something more than implication. Otherwise it is a word of limitation. Words of purchase will be treated as such until it is unmistakably shown that the grantor designed to use them in a different sense."

And, again, the same author (p. 559), says:

"Where the limitation of the remainder is to a *son* or *sons*, or to children or issue, *or to an heir or heirs* of him to whom the first estate for life is limited, if the term 'heirs' is clearly intended as a *descriptio personæ*, the *individuals* or persons thus designated take as *purchasers*, and do not come within the rule under consideration."

To this statement the author cites a large number of cases.

In the case of *Chelton* v. *Henderson* (9 Gill, 432, 437, 438), the syllabus states this in these words :

" This rule " (in Shelley's case) " is not an imperious rule of law which must control the operation of the will, no matter how clearly the contrary *intention* may be expressed upon its face, but it is a *rule of construction* that must prevail *except in cases where a contrary intention satisfactorily appears by the will itself.*"

In *Clark* v. *Smith* (49 Md., 117), opinion by Alvey, J., the court states the rule as follows :

" It is a well-settled rule of construction that technical words of limitation used in a devise, such as ' heirs ' generally, or ' heirs of the body,' shall be allowed their legal effect, *unless, from subsequent inconsistent words, it is made perfectly plain that the testator* MEANT *otherwise.* Or, to use the language of Lord Eldon in *Wright* v. *Jesson*, 2 Bligh, 1, ' the words " heirs of the body " will indeed yield to a particular intent that the estate shall *be only for life, and that may be from the effect of superadded words, or any expression showing the particular intent of the testator*, but they must be clearly intelligible and unequivocal."

The case of *Luddington* v. *Kime* (1 Lord Raymond, 203), held what the syllabus expresses in these words :

" The word ' issue ' in a will may, and, where words of limitation are engrafted upon it, shall, be a word of purchase."

And please observe that this case is expressly *approved* in *Doe* v. *Considine* (6 Wall., 473).

In the case of *Shreeve* v. *Shreeve* (43 Md., 395), the Court of Appeals of that State says :

" But what is more important to the decision of this case is the fact that the *doctrine of Luddington* v. *Kime and other similar cases has been repeatedly recognized and approved by the courts of this State.* Thus in *Horn* v. *Lythe* (4 H. & J., 435), a case which Chancellor Kent cites as containing a learned and accurate exposition of the rule,

under all its modifications and exceptions, we find an exception to its operation thus stated: 'So, where the persons to take *can not take as heirs* by the description by reason of a distributive direction incompatible with the course of descent, as where gavelkind lands *were devised to A and the heirs of her body lawfully to be begotten, as well males as females,* AND TO THEIR HEIRS AND ASSIGNS FOREVER, to be equally divided between them, share and share alike, as tenants in common, and not as joint tenants, in this case it was held that the words "heirs of the body" did not operate as words of limitation, *because they were* CORRECTED OR EXPLAINED by the words which followed, and were irreconcilable with the notion of descent; *and also because there were words of fee engrafted on the words of limitation which showed that the estates given to the children, and not the estate to A, were to be the groundwork of succession of heirs, or, in other words, that the children of A were to be the termini for the succession to take its course from.*'"

It is extremely important to note that the case here put, of a devise to A and the heirs of her body lawfully begotten, and to their heirs forever, *and which was held to be a case where the rule in Shelley's case did not apply, is the identical case at bar in every essential respect.*

See, also,

Halstead v. *Hall*, 60 Md., 209;
Henderson v. *Henderson*, 64 Md., 185;
Timanus v. *Dugan*, 46 Md., 402;
Donnelly v. *Turner*, 60 Md., 81;
Fulton v. *Harman*, 44 Md., 263;
Heilman v. *Bouslaugh*, 13 Pa. St., 3523;
Kime's Appeal, 125 Pa. St., 480, 488;
Guthries' Appeal, 37 Pa. St., 9, 12;
Kuntzleman's Appeal, 136 Pa. St., 142;
Tyler v. *Moore*, 42 Pa. St., 374.

In the case of *Giffin's Estate* (138 Penna. St., 327, 329), the devise was one to the devisee "during her natural life, and after her decease, the same to go to her children

and their descendants," and it was held that the devisee took but a life estate, and that the word "children" was used as a word of purchase.

This case is instructive, as bearing upon the present case, because of what it holds, as expressed on page 229:

"The devise, however, is to her for life, and at her decease to her children and *their*, not HER, descendants. *The limitation being to the descendants of the remainderman shows that it was the intention of the testator that Mrs. Rankin's children should become the root of a new succession, and take in the will as purchasers and not heirs. The rule in Shelley's case does not, therefore, apply. See Guthrie's Appeal, 37 Pa. St., 13.*"

See, also,

Patterson v. *Hawthorne*, 12 S. & R., 112;
Ulrich's Appeal, 86 Pa. St., 386;
Fox's Appeal, 99 Pa. St., 386.

In the case of *Ridgeway* v. *Lamphear*, (99 Ind., 251) it was held that—

"The word 'heirs' may be construed to mean 'children' when it clearly appears that the testator clearly intended it to have that meaning."

See, also,

Millett v. *Ford*, 109 Ind., 159;
Bruce v. *Bissell*, 119 Ind., 525;
Ernhart v. *Ernhart*, 127 Ind., 397;
Butler v. *Huestis*, 68 Ill., 594;
Beasly v. *Engel*, 107 Ill., 182;
Howell v. *Knight*, 100 N. C., 254;
Blanchard v. *Blanchard*, 1 Allen, 227.

In the case of *Croxall* v. *Shererd* (5 Wall., 268), the question involved and decided was whether a grant to one Mrs. Mary Croxall for life, and, after her death, to the use and behoof of the *heirs of the body of said Mary*

by her present husband lawfully begotten, or to be begotten, or to the heirs of his, her, and their bodies lawfully begotten, came within the rule in Shelley's case on account of the use of the words "heirs of their bodies lawfully begotten;" and the court held expressly that it did not—the court stating, on page 287, in answer to this question, its decision in the following words:

"Laying out of view the act of the legislature of 1818, and what was done under it, this is still an erroneous view of the subject" (to wit, the view that the remainder to Thomas was contingent until the death of his father and mother, and that nothing passed by his deed to Wall). Thomas was living at the time of the execution of the deed of 1793, *and took at once an estate vested in right, and deferred only as to the time of possession and enjoyment.* It was in the latter respect only contingent and expectant. If this were not so, upon the death of the remainderman before the vesting of the possession, his children could not inherit."

The same legal question presented by the case at bar was presented to this court in this case of *Croxall* v. *Shererd*, with only the difference that the conveyance, in the Croxall case, was by *deed*, whereas, in the case at bar, it was by *will*, said difference being, therefore, in favor of the vesting, in the case at bar, of a remainder in the children of Mrs. Mitchell.

And to the same effect the last paragraph of the headnote in the case says:

"The court held that the estate in remainder of the party in possession and supposed to have a valid title was a *vested remainder*, and not a contingent one."

This case, therefore, we submit, is, in principle, exactly similar to the case at bar, and authoritatively defines what is the effect and applicability of the rule in Shelley's case as affecting the question of vested remainders, and what shall be held to be the *meaning* of the words "heirs

begotten of her body" when found in such a conveyance as the one in the case at bar.

It is impossible for us to see why this case is not absolutely decisive of the present case. It has been recognized and affirmed in the following cases:

Doe, Lessee of Poore v. *Considine*, 6 Wall, 478;
Green v. *Green*, 23 Wall, 486:
Ould v. *Washington Hospital*, 95 U. S., 312;
Partee v. *Thompson*, 11 Federal Rep., 776.

In *Doe* v. *Considine* (6 Wall., 475), the court says:

"The law will not construe a limitation in a will into an executory devise when it can take effect as a remainder, nor a remainder to be contingent when it can be taken to be vested. It is a rule of law that estates shall be held to vest at the earliest possible period, unless there be a clear manifestation of the intention of the testator to the contrary."

Citing in the note a large number of American authorities.

We beg the careful attention of the court to this leading case. It is reaffirmed, recognized, and approved in innumerable cases since, as, for example, at 19 Wall., 176; 23 Wall., 491; 1 Abb. U. S., 174; 101 U. S., 788; 1 McA., 196; 113 U. S., 379, 380, and 11 Fed. Rep, 776.

In the case of *Daniel* v. *Whartenby* (17 Wall., 644, 646–7), the court says:

"The estate is given after his death to his *issue* 'by him lawfully begotten of his body.' These must necessarily have been his *children*. They could not have been otherwise. It will do no violence either to the language here used, or to the context, if this clause be regarded as if a testator had substituted the latter words for the former in framing this part of the instrument.

"In the English courts, the doctrine of Shelley's case is applied unless there are circumstances which clearly take the devise out of that rule. Every doubt is resolved in favor of its application. Here we think the tendency should be otherwise. There the rule is in accordance with the established law of descent—the general senti-

ment of the people—their public policy and the spirit of their institutions. It helps to conserve the power and splendor of ruling classes by keeping property in the line of descent which the rule prescribes.

"Our policy is *equality* of descent and distribution. Such is the sentiment of our people, and such the spirit of our institutions.

"It is manifested by the statutes of descent and distribution which exist in all of our States and Territories.

"*We entertain no doubt that the testator intended to give a life estate to Richard and a fee simple to his issue, and that they should be the spring-head of a new and independent stream of descent.* We find nothing in law of the case which prevents our giving effect to that intent.

"We hold that the rule in Shelley's case, for the reason stated, does not apply."

See, also, the case of *Green* v. *Green* (23 Wall., 486, 491), where this court approves the principles stated in the cases of *Doe* v. *Considine and Croxall* v. *Shererd* (*supra*).

It would be useless, as well as improper, to further extend this citation of authorities, establishing that the words "heirs"—"heirs of her body"—"heirs of her body begotten," etc.—may be used as words of purchase and may be mere *descriptio personæ*, taking in only *specific individuals* thereby designated, and not be words of limitation, provided the entire will shows that the word "heirs," etc., was used in such limited sense.

As to this point, whatever confusion may be in the authorities, there is no *conflict*, and we therefore pursue the subject farther.

The authorities above presented show, as we have remarked, conclusively, that the word "heirs"—"heirs of her body"—"heirs of her body begotten"—will be held to be words of *purchase* and not of limitation wherever the context shows that these words were used in the sense of children, and the words "heirs of her body begotten" can mean no other than children.

IV.

The Intention.

To the numerous cases cited above, showing how fully the American courts, in dealing with provisions in wills supposed to involve the application of the rule in Shelley's case, or other technical rules relied on to defeat the intention of the testator, bow to the testator's ascertained intention, derived from "the four corners of the will," and make such intention the "polar star" (6 Pet., 80), in guiding them to the true construction of the will, we now add a special reference to that leading case of *Smith* v. *Bell*, in which Chief Justice Marshall delivers one of his most exhaustive opinions (6 Pet., 68).

To all parts of this opinion we beg the careful attention of the court. It will be found recognized and reaffirmed in the following cases:

Grant v. *Coal and Iron Co.*, 93 U. S., 333, 334;
Blake v. *Hawkins*, 98 U. S., 324;
Giles v. *Littel*, 104 U S., 296, 297, 299, 300;
Colton v. *Colton*, 127 U. S., 309;
Partee v. *Thomas*, 11 Fed. R., 776.

Does the will of Samuel De Vaughn show that when he uses, with regard to the bequest to Mrs. Mitchell, the words "*heirs begotten of her body and their heirs and assigns forever*," he there meant, by the words "heirs begotten of her body," her *children*, and did not use the word "heirs" in the sense of heirs general and as a word of limitation?

The answer to this question is both obvious and conclusive, and is that he there used the word "heirs" as a word of purchase and as equivalent to "children."

In enforcing this view of the matter, please keep in mind what all the American authorities touching the

point lay down, namely, that the word "heirs," in order to be a word of limitation and not of purchase, must appear to have been used, not as a mere "*descriptio personæ*," but to have been so used as to embrace and "take in *all* the persons in *all* generations belonging" to the class designated by the law as "heirs." See this expressly laid down in numerous cases, as, for example, in *Fulton* v. *Harmon* (44 Md., 261, 262).

The proposition just stated is so thoroughly settled as to be a maxim in the law of real property.

Therefore if a testator uses words in connection with this word "heirs," which show that it could not take in "*all* persons in all generations," but must mean, on the contrary, *children* of the first taker, the word "heirs" is, of necessity and absolutely, a word of purchase and not of limitation.

Turning, now, to the words of this will, used in connection with this word "heirs," it becomes, and is, absolutely self-evident that the word "heirs," as used in the clause of this will devising the property in square 483 and square 378, etc., is used in the sense of the word "children."

The words so used in connection with the word "heirs" are "heirs begotten of her body, and to *their* heirs and assigns." It is clearly impossible that the words "heirs of the body begotten," as found in Samuel DeVaughn's will, should mean anything else than the "children" of Mrs. Mitchell.

No person can be forced into the class here designated, to wit, "heirs" begotten of Mrs. Mitchell's body, who are not the fruit of her womb. Are Mrs. Mitchell's grandchildren or Mrs. Mitchell's great-grandchildren, or her nephews or nieces, persons of whom it can be predicated that they are begotten of Mrs. Mitchell's body? It would be precisely as rational to say that Mrs. Mitchell's father, or her grandfather, or her great-grandfather, are persons

that were begotten of her body, as it would be to say that any person who is not the child of Mrs. Mitchell is still a person that was begotten of her body.

Again. It is indispensable to observe, in order to a right conclusion regarding this will, that, in other parts of it—for example, in that provision which wills to Mrs. Mitchell the west part of lot 18 in square 328, and all its improvements—the devise is to Martha Ann Mitchell, daughter of Susan Brayfield, *and to her heirs and assigns forever.*

So in regard to the devise of lot D in square 408, and part of lot 5 in square 405, and lot 2 in square 487. These are devised to his brother John *and to his heirs and assigns forever.* And so in regard to the devise to his brother William, of lot 3 in square 1095, etc., etc. These are devised to William *and to his heirs and assigns forever.*

Thus it is made plain and express that the *distinction* between a devise in fee simple to the first taker, and a devise of a life estate, with remainder over to others as purchasers, is repeatedly and carefully kept in mind and observed throughout this will. Such a fact as this, it will be found, is, by the decisions, kept constantly in view in ascertaining whether the testator meant that the remainder over should be one taken by purchase or by limitation.

V.

Conclusion.

It is upon the propositions above set forth, mainly, that the Court of Appeals held that the rule in Shelley's case does not apply in this case. Mr. Chief Justice Alvey, in that opinion, has most clearly and ably discussed the law on this subject, and applied it to the provisions of

this will. That opinion is printed in the Record (*pp. 16–21*), and, therefore, it would be inappropriate to quote from it in this brief; but we beg leave to especially invite the attention of the court to it, as containing as clear and forcible a presentation of the law upon this subject as can anywhere be found.

From all of the foregoing, it would seem inevitably to result that, under the will of Samuel De Vaughn, the children of Mrs. Mitchell took a vested remainder, which took effect, as such, at the death of the testator, and that it was only the *enjoyment* of the estate, and not the vested interest therein, that was postponed until after the death of Mrs. Brayfield and of Mrs. Mitchell; and that, moreover, the creation of such vested remainder excludes the possibility of any lapse by reason of the death of Mrs. Mitchell before that of the testator, and further excludes the possibility of such devise being brought within the operation of the rule in Shelley's case.

In view of all that has been gone over, we respectfully submit to the court, with the utmost confidence, that it will be quite impossible to reach the conclusion that the great injustice shall be done to the children of Mrs. Mitchell of *excluding* them from their share in the bounty of Samuel De Vaughn because of the misfortune of their having lost their mother before the time of the death of the said testator, while, at the same time, all the other devisees and legatees (who outlived said testator) and their children are allowed to come in and take away the shares of the children of Mrs. Mitchell, and also take what was willed to them.

The authorities which we have above presented show that the injustice, resulting from an arbitrary application of the rule in Shelley's case is in these American States constantly avoided—that the smallest departures from the requirements to the applicability of the rule in Shelley's case are, in our country, *eagerly seized upon* by

the courts in order to avoid the defeat of the intentions of the testator which that rule so commonly brings about, and that the legislatures of nearly all the States, including now the State of Maryland, have, in substance, abolished that rule.

JEREMIAH M. WILSON,
A. A. HOEHLING, JR.,
Attorneys for Appellees.

WASHINGTON, D. C.,
October 29, 1896.

165-578

165-578

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 446.

E. ALLGEYER & CO., A COMMERCIAL PARTNERSHIP COMPOSED OF CHARLES E. ALLGEYER, ERNEST SIEGFRIED, RÉNÉ BLOCK, CHARLES A. MARANDE, & OLIVIER SERA, PLAINTIFFS IN ERROR,

vs.

THE STATE OF LOUISIANA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

FILED FEBRUARY 15, 1896.

(16,190.)

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1 STATE OF LOUISIANA,
Parish of Orleans, City of New Orleans.

Civil District Court for the Parish of Orleans.

Petition.

Filed December 21st, 1894.

STATE OF LOUISIANA
vs.
E. ALLGEYER & Co. } No. 44648. C'v'l Dist Court, Division "E."

To the honorable the judges of the civil district court for the parish of Orleans:

The petition of the State of Louisiana, herein appearing and represented by her attorney general, M. J. Cunningham, for the use and benefit of the charity hospitals in New Orleans and Shreveport, respectfully shows:

That E. Allgeyer & Co., a commercial firm domiciled and doing business in the city of New Orleans, State of Louisiana, and composed of Emile Allgeyer and Ernest Siegfried is justly and truly indebted unto your petitioner in the full sum of three thousand dollars ($3,000), for this, to wit:

That on the 27th day of October, 1894, said E. Allgeyer & Co. did effect insurance under an open policy for itself, on property situated in the State of Louisiana, in the Atlantic Insurance Co. of New York, a corporation organized and doing business in the State of New York and not domiciled or doing business in the
2 State of *New York and not domiciled or doing business in the State of* Louisiana.

That the said defendant did mail and issue a letter of advice or certificate of marine insurance, on the date aforesaid, advising the Atlantic Mutual Insurance Co. of New York of the shipment of 100 bales of cotton to foreign parts, in accordance with the terms of an open marine policy made and entered into between said defendant and the Atlantic Mutual Insurance Company of New York, which said 100 bales of cotton were at the time located in the State of Louisiana and in the city of New Orleans; that according to the terms of said open policy no insurance could be effected on said cotton without the mailing of such letter or certificate; that the said Atlantic Mutual Insurance Co. of New York had no duly authorized agent in this State and has not complied with the laws of this State, and especially with article 236 of the constitution. By reason of the foregoing acts and offenses the said firm of E. Allgeyer & Co. is liable to petitioner in the penal sum of one thousand dollars.

That on the 5th day of September, 1894, a similar transaction was entered into between said defendant and the Atlantic Mutual Insurance Co. of New York, whereby the shipment of 90 bales of

cotton to foreign ports was insured, said cotton being then in the State of Louisiana, city of New Orleans. By reason of the foregoing defendant is liable to petitioner in the penal sum of one thousand dollars for said act.

That on October 12th, 1894, a similar transaction was made and entered into by and between said defendant and the said Atlantic Mutual Insurance Company of New York concerning marine insurance on 60 bales of cotton to foreign ports, said cotton
3 being then in the city of New Orleans, State of Louisiana; for which act defendant is liable to petitioner in the penal sum of one thousand dollars ($1,000).

That all of the aforesaid acts and doings of said E. Allgeyer & Co. are contrary to the constitution and laws of this State, and especially act 66 of 1894.

Wherefore petitioner prays that E. Allgeyer & Co. and Ernest Siegfried be duly cited to appear and answer hereto, and after due proceedings had there be judgment in favor of petitioner and against defendants, E. Allgeyer & Co., and the individual members thereof in the full sum of three thousand dollars.

And petitioner prays for all costs and general relief.

(Signed) M. J. CUNNINGHAM,
Att'y General.

(Signed) E. H. McCALEB, JR.,
Of Counsel.

Answer.

Filed January 22nd, 1895.

STATE OF LOUISIANA } No. 44648. C'v'l Dist. Court,
vs. } Division "E."
E. ALLGEYER & CO. }

Now come defendants and, for answer to plaintiff's petition, de*nies* all and singular the allegations therein contained, except in so far as the same may be hereinafter admitted.

Further answering, defendant avers that act No. 66 of the General Assembly of the State of Louisiana of the year 1894, approved July 6th, 1894, under and by virtue of the provisions of which this suit is brought, is unconstitutional, null, and void for this, to wit:

4 That it deprives defendants of their property without due process of law and denies them *of* the equal protection of the laws, in violation of the constitution of the State of Louisiana and of the Constitution of the United States; that it also denies to defendants the equal protection of the laws, also in violation of both said constitutions.

That the business concerning which defendants are sought to be made liable herein and the contracts made in reference thereto are beyond the jurisdiction of the State of Louisiana and are not amenable to any penalties imposed by its laws; that the contracts of in-

surance made by defendants are made with the Atlantic Mutual Insurance Company, in the city of New York, where the premiums are paid and where the losses thereunder are also to be paid; that the said contracts are New York contracts, and under the Constitution of the United States defendants have the right to do and perform any act or acts within the State of Louisiana which may be necessary and proper for the execution of said contracts, and in so far as the said act No. 66 of the General Assembly of the State of Louisiana of the session held in the year 1894 may be construed to prevent or interfere with the execution of said contracts the same is unconstitutional, null, and void, in violation of the constitution of the State of Louisiana and of the United States in the particulars aforesaid.

Wherefore defendants pray that plaintiff's demand be rejected and this suit dismissed with costs, and for general relief.

(Signed) BRANCH K. MILLER,
Att'y for Defendants.

Statement of Facts.

Filed May 31st, 1895.

5 STATE OF LOUISIANA } No. 44648. C'v'l Dist. Court,
vs. Division "E."
E. ALLGEYER & Co. }

The defendants made with the Atlantic Mutual Insurance Company, a corporation created by the laws of the State of New York and domiciled and carrying on business in the city of New York, in said State, the contract evidenced by the policy of insurance attached to this agreement as part hereof as Exhibit "A."

The Atlantic Mutual Insurance Company is engaged in the business of marine insurance, has appointed no agent in the State of Louisiana, and has not complied with the conditions required by the laws of this State for the doing of business within the same by insurance companies incorporated and domiciled out of the State.

On October 23rd, 1894, the defendants mailed to said company a communication the tenor and form of which is shown by Exhibit "B," attached to and made part hereof. At the time of the mailing of the said communication the cotton referred to by it, to wit, one hundred bales, was within the State of Louisiana.

The premiums to be paid under said contract of insurance and the loss or losses under the same are payable in the city of New York, the said premiums being remitted by defendants from New Orleans by exchange.

Defendants are exporters of cotton from the port of New Orleans to ports in Great Britain and on the continent of Europe; they sell cotton in New Orleans to purchasers at said ports. For the price of every sale of cotton made by them they, in accordance with the general custom of business, draw a bill of exchange against
6 the purchaser for the price, attaching to the same the bill of lading for the cotton and an order of the Atlantic Mutual

Insurance Company for a new and separate policy of insurance, spoken of in the policy marked Exhibit A, the form of said order being that shown by Exhibit C, attached as part hereof. This bill of exchange, with the bill of lading attached, is sometimes negotiated with banks in the city of New York; sometimes it is not negotiated at all, but forwarded direct for collection from the purchaser of the cotton. The bill of exchange, with bill of lading and order for insurance attached, in either case is sent from New Orleans first to New York, where, after its negotiation or before being forwarded from thence for collection, the order for insurance is presented to the Atlantic Mutual Insurance Company. Upon this showing the insurance company in New York issues and delivers to the holder of the exchange and bill of lading when the former has been negotiated, or to the agent of defendant when the exchange has not been negotiated, a new and a separate policy of insurance for the cotton, in accordance with the contract made with the defendants and evidenced by the policy attached to this statement as part hereof as Exhibit A. This new and separate policy, when received, is attached to the bill of exchange. The exchange cannot be negotiated in New York unless it is accompanied by both the bill of lading and order for insurance, and unless the new and separate policy issued by the company is attached to it the purchaser of the cotton is under no obligation to pay the bill drawn on him for the price of the cotton. The new and separate policy delivered to the holder of the exchange and bill of lading in New York, or to defendant's agent there, as the case may be, is for the benefit of the holder of the latter, or of defendants, according as the exchange has been negotiated or not. The holder of the exchange becomes the owner of the cotton covered by the bill of lading attached and is the
7 owner of the policy of insurance covering the same, in the event of a loss within the terms of the policy.

The business thus described is conducted as above by the general custom and agreement of all parties concerned.

(Signed) M. J. CUNNINGHAM,
Att'y General.

(Signed) B. K. MILLER,
Att'y for Defendants.

(Signed) E. H. McCALEB, JR.,
Of Counsel for Plaintiff.

Communication, Dated October 3rd, 1894, to Insurance Company, Attached to Agreement, Marked Exhibit "B."

Filed May 31st, 1895.

STATE OF LOUISIANA
vs.
E. ALLGEYER & CO. } No. 44648. C'v'l Dist. Court, Division "E."

Insurance is wanted by E. Allgeyer & Co. for account of same, loss, if any, payable at Paris, in French currency, computed at the

rate of twenty cents, United States currency, to the franc, to —— —— or order by J. S. Morgan & Co. upon the surrender to them, in London, of this policy with an adjustment of the loss made by Frederick Wood, of Havre, France.

For $3,400.00 on one hundred b. c. on board of steamer ——, —— ——, master, and to be insured at and from L. Rock to N. Orleans per R. R., and thence per steamer to Havre.

Fast: 100 b. c. for thirty-four hundred dollars.

Charges and expenses in currency to be reduced to the standard of gold; bill of lading dated ——; premium, — per cent., payable in gold; time of sailing, ——.

8 Binding.

189. (Signed) E. ALLGEYER, *Applicant*,
Per P. ROUBLOT.

N. Orleans, October 22nd, 1894.

And on the face of said communication appears the following inscription:

Warranted by the assured that vessels to be loaded with grain from the ports of New York, Philadelphia, or Baltimore for foreign ports are to be loaded under the inspection of the surveyor of the board of underwriters and his certificate as to their proper loading and seaw*i*-thiness obtained.

And it further appears:

Warranted by the assured free from claim on account of capture, seizure, detention, or destruction by or arising from any belligerent nation or by or from any officer, civil or military, or other person claiming to act in their name or under their authority or in their behalf.

Order on the Atlantic Mutual Insurance Company for a New and Separate Policy of Insurance, Attached to Agreement, Marked "C."

Filed May 31st, 1895.

STATE OF LOUISIANA *vs.* E. ALLGEYER & Co. } No. 44648. C'v'l Dist. Court, Division "E."

Attached to draft No. — on —— from E. Allgeyer & Co., New Orleans, 189, to Atlantic Mutual Ins. Co., New York.

Marks and numbers, ——.

9 Please deliver to —— —— or order special policy for $— on —— bales cotton per —— from New Orleans to ——.

Respectfully,

(Signed) E. ALLGEYER & CO.,
Per —— ——.

Submission.

Extract of Minutes of May 31st, 1895.

Present: The Honorable George H. Théard, judge.

STATE OF LOUISIANA
vs.
E. ALLGEYER & Co. } No. 44648. C'v'l Dist. Court, Division "E."

This cause came on this day for trial—present, counsel for both parties—when, by consent, the matter was submitted, and the court took the same under advisement.

Judgment.

Rendered June 17th, 1895.

STATE OF LOUISIANA
vs.
E. ALLGEYER & Co. } No. 44648. C'v'l Dist. Court, Division "E."

10 For the reasons this day orally assigned by the court, the law & the evidence being in favor of defendants—

It is ordered, adjudged, & decreed that plaintiff's demand be rejected.

Judgment rendered June 17th, 1895.

Judgment signed June 21st, 1895.

(Signed) GEO. H. THÉARD, *Judge.*

Motion of Appeal.

Extract of Minutes of June 24th, 1895.

Present: The Honorable Geo. H. Théard, judge.

STATE OF LOUISIANA
vs.
E. ALLGEYER & Co. } No. 44648. C'v'l Dist. Court, Division "E."

On motion of M. J. Cunningham, att'y general, and E. H. McCaleb, Jr., of counsel for plaintiff, and on suggesting to the court that there is error to its prejudice in the final judgment herein, rendered on the 17th day of June, 1895, and signed on the 21st day of June, 1895, and that he desires to suspensively appeal therefrom—

It is ordered that a suspensive appeal be granted unto plaintiff, The State of Louisiana, from the final judgment herein, rendered on the 17th day of June, 1895, and signed on the 21st day of June, 1895, returnable to the honorable the supreme court of the State of Louisiana on the first Monday of November, 1895 (Nov. 4th, 1895), without bond, the State being dispensed from giving bond.

11 *Agreement.*

Filed August 6th, 1895.

STATE
vs.
E. ALLGEYER & Co. } No. —. Civil District Court.

In this case it is agreed that the policy of insurance forming part of the statement of facts shall not be copied into the transcript, but shall be taken to the supreme court in original in this form, to be taken and considered in all respects as though copied into the transcript at length.

(Signed) M. J. CUNNINGHAM, *Att'y Gen'l.*
(Signed) E. H. McCALEB, JR., *Of Counsel.*
(Signed) B. K. MILLER, *Att'y for Def'd'ts.*

12 *Certificate.*

STATE OF LOUISIANA:

Civil District Court for the Parish of Orleans.

I, Geo. W. Prados, d'y clerk of the civil district court for the parish of Orleans, do hereby certify that the foregoing twelve pages do contain a true, correct, and complete transcript of all the proceedings had, documents and evidence adduced, upon the trial of the cause wherein State of Louisiana is plaintiff and E. Allgeyer is defendant, instituted in this court and now in the records thereof, under the No. 44648, made in compliance with agreement of counsel (same annexed to transcript, page 12; policy of insurance annexed to transcript).

In testimony whereof I have hereunto set my hand and affixed the impress of the seal of said court, at the city of New Orleans, on this 23rd day of August, in the year of our Lord one thousand eight hundred and ninety-five, and in the one hundred and 20th year of the Independence of the United States of America.

[SEAL.] (Signed) GEO. W. PRADOS, *D'y Clerk.*

UNITED STATES OF AMERICA,
State of Louisiana.

Supreme Court of the State of Louisiana.

Proceedings Had in the Supreme Court of the State of Louisiana.

Transcript of appeal. Filed September 2nd, 1895. (Signed) Paul E. Mortimer, deputy clerk.

13 EXHIBIT "A."

(Filed September 2nd, 1895.)

Policy of Insurance.

23
(Cargo.) By the Atlantic Mutual Insurance Company. (No. 26474.)

E. Allgeyer & Co. on account of themselves; and to cover cotton in bales purchased and shipped by them on which drafts are drawn for the purchase upon whom it may concern—

(327,671.)

New Orleans.

Loss, if any, to be paid in gold to E. Allgeyer & Co.

Do make insurance, and cause to be insured, lost or not lost, at and from ports and places in Texas, Louisiana, Mississippi, Alabama, Georgia, Arkansas, Missouri, or Tennessee, to the mills in the New England or Middle States when destined to such mills, with liberty to transship one or more times; or to port or ports in the United Kingdom of Great Britain or on the continent of Europe between Hamburg and Trieste both inclusive, direct or by steamers only via New York, Boston, Philadelphia or Baltimore, for transhipment; or to Gothenburg, direct, or by steamers only via New York, Boston, Philadelphia, or Baltimore for transhipment by the usual routes—including the risk of fire prior to shipment, the risk to attach upon the cotton becoming the property of E. Allgeyer & Co. and at their risk, and to attach on or after September 1st 1893, and prior to September 1st 1894—

Shipments applicable to this policy to be reported to this company by mail or telegraph on day of purchase—

Warranted not to cover cotton in charge of carriers on shore or during inland transportation.—

On cotton in bales.

No risk is to be insured by this policy until a letter
14 signed by —— —— and addressed to the president of this company, detailing name of vessel, particulars of shipment, with description of the property and amount to be insured, is deposited in the post-office at ——, which must be done while the property is in good safety, and in all cases prior to the departure of the risk from ——; a duplicate of such letter to be sent by the following mail.

[Written across the face:] W. H. H. M., V. P.

A new and separate policy to be issued for each risk, the premium on which is to be paid in cash upon the delivery of such policy in New York to E. Allgeyer & Co.—

Risks endorsed hereon and subsequently taken off, and new and separate policies issued, are not to exhaust this policy.

Vessel or vessels and conveyances upon all kinds of lawful goods and merchandize, laden or to be laden on board the good ship*ments* —— to be made on or after September 1st 1893 and prior to September 1st 1894 whereof is master for the present voyage, —— —— or whoever else shall go for master in the said vessel, or by whatever other name or names the said vessel, or the master thereof, is or shall be named or called.

Sum insured $200,000

Each ten bales cotton, successive numbers in the order of invoice, subject to their own particular average as if separately insured, and when not numbered, then each mark of not less than ten bales subject to its own particular average as if separately insured.

Premium... ...	$2,000
Policy	1 25
	$2,001 25

Warranted free from claims for country damage, or damage from exposure during inland transportation or previous to loading. It is by the assured expressly stipulated in respect to land carriers, that no right of subrogation is or is to be, abrogated or impaired by or through

Beginning the adventure upon the said goods and merchandises, from and immediately following the loading thereof on board of the said vessel, at as aforesaid, and so shall continue and endure until the said goods and merchandises shall be safely landed at as aforesaid. And it shall and may be lawful for the said vessel, in her voyage, to proceed and sail to, touch and stay at, any ports or places, if thereunto obliged by stress of weather, or other unavoidable accident, without prejudice to this insurance.

The said goods and merchandises,
15 hereby insured are valued including premiums at the sums expressed in the letter of advice as provided for herein not to exceed the invoice cost and fifteen per cent.

Touching the adventures and perils which the said Atlantic Mutual Insurance Company is contented to bear, and takes upon itself in this voyage, they are of the seas, men-of-war, fires, enemies, pirates, rovers, thieves, jetti-

[Matter enclosed between rules erased in copy.]

any agreement intended to relieve a carrier from duties or obligations imposed or recognized by the common law or otherwise.

In case of loss prior to issue of certificate or policy and negotiation of exchange for purchase of cotton, the liability under this insurance is not to exceed the cost of the cotton and charges added; except in cases where the assured is compelled by his contract to replace the cotton destroyed; in which cases the actual cost — the new cotton and of placing it where the old cotton was lost, shall be the limit of claim, provided it does not exceed the sum insured.

sons, letters of mart and counter-mart, reprisals, takings at sea, arrests, restraints and detainments of all kings, princes or people, of what nation, condition or quality soever, barratry of the master and mariners, and all other perils, losses and misfortunes, that have or shall come to the hurt, detriment or damage of the said goods and merchandises or any part thereof. And in case of any loss or misfortune it shall be lawful and necessary to and for the assured, — factors, servants and assigns, to sue, labor, and travel for, in and about the defense, safeguard and recovery of the said goods and merchandises or any part thereof, without prejudice to this insurance; nor shall the acts of the insured or insurers, in recovering, saving and preserving the property insured, in case of disaster, be considered a waiver or an acceptance of an abandonment; to the charges whereof, the said insurance company will contribute according to the rate and quantity of the sum herein insured; having been paid the consideration for this insurance, by the assured or — assigns at and after the rate of one per cent. on the subscribed amount of this policy on account. Payable in gold. The company are to be entitled to premium on all shipments reported as provided for above. The rate of premium shall be fixed by the president or the vice-president of the company, when the vessel and nature of the risks are known and understood, charges and expenses in currency to be reduced to the standard of gold. Each party at liberty to cancel this policy upon giving the other ten days' notice of intention so to do. An approved note to be given for the premium note on this policy.

16

The amount of risk under this policy is not — exceed $100,000 by any one steamer at one time, nor more than $50,000 against the risk of fire in any depots, yards, presses, on wharf, pier or in railroad depot, at any one time.

(39) The amount of risk under this policy is not to exceed $— by any one vessel.

(11) Warranted by the assured free from claim on account of capture, seizure, detention or destruction, by or arising from any belligerent nation, or by or from any officer, civil or military, or other person claiming to act in their name, or under their authority, or in their behalf.

(18) Proof of loss to be authenticated by the agent of the company, if there be

And in case of loss, such loss to be paid in thirty days after proof of loss, and proof of interest in the said — (the amount of the note given for the premium, if unpaid, being first deducted,) but no partial loss or particular average shall in any case be paid, unless amounting to five per cent. Provided always, and it is hereby further agreed, that if the said assured shall have made any other assurance upon the premises aforesaid, prior in the day of date to this policy, then the said Atlantic Mutual Insurance Company

[Matter enclosed between rules erased in copy.]

one at the place such proofs are taken.

(19) Charges and expenses in currency to be reduced to the standard of gold.

(25) Dividend of profits, if any, may be declared on the amount of premium terminated and marked off by the company, the same as if the premium was in currency, and for such purpose a dollar in gold will be treated as a dollar in currency, and this insurance is accepted on these terms.

shall be answerable only for so much as the amount of such prior assurance may be deficient towards fully covering the premises hereby assured; and the said Atlantic Mutual Insurance Company shall return the premium upon so much of the sum by them assured, as they shall be by such prior 17 assurance exonerated from. And in case of any insurance upon the said premises, subsequent in day of date to this policy, the said Atlantic Mutual Insurance Company shall nevertheless be answerable for the full extent of the sum by them subscribed hereto, without right to claim contribution from such subsequent assurers, and shall accordingly be entitled to retain the premium by them received, in the same manner as if no such subsequent assurance had been made. Other insurance upon the premises aforesaid, of date the same day as this policy, shall be deemed simultaneous herewith and the said Atlantic Mutual Insurance Company shall not be liable for more than a ratable contribution in the proportion of the sum by them insured to the aggregate of such simultaneous insurance. It is also agreed, that the property be warranted by the assured free from any charge, damage or loss, which may arise in consequence of a seizure or detention, for or on account of any illicit or prohibited trade, or any trade in articles contraband of war.

Warranted not to abandon in case of capture, seizure, or detention, until after condemnation of the property insured; nor until ninety days after notice of said condemnation is given to this company. Also warranted not to abandon in case of blockade, and free from any expense in consequence of capture, seizure, detention or blockade; but in the event of blockade, to be at liberty to proceed to an open port and there end the voyage.

In witness whereof, the president or vice-president of the said Atlantic Mutual Insurance Company hath hereunto subscribed his name, and the sum insured, and caused the same to be attested by their secretary, in New York, the 5th day of September one thousand eight hundred and ninety-three.

18 MEMORANDUM.—It is also agreed, that bar, bundle, rod, hoop and sheet iron, wire of all kinds, tin plates, steel, madder, sumac, wicker-ware and willow, (manufactured or otherwise), salt, grain of all kinds, tobacco, Indian meal, fruits, (whether preserved or otherwise), cheese, dry fish, hay, vegetables and roots, rags, hempen yarn, bags, cotton bagging, and other articles used for bags or bagging, pleasure carriages, household furniture, skins and hides, musical instruments, looking glasses, and all other articles that are perishable in their own nature, are warranted by the assured free from average, unless general; hemp, tobacco stems, matting and cassia, except in boxes, free from average under twenty

per cent. unless general; and sugar, flax, flax seed and bread, are warranted by the assured free from average under seven per cent. unless general; and coffee, in bags or bulk, pepper in bags or bulk, and rice free from average under ten per cent., unless general.

Warranted by the insured free from damage or injury, from dampness, change of flavor, or being spotted, discolored, musty or mouldy, except caused by actual contact of sea water with the articles damaged, occasioned by sea perils. In case of partial loss by sea damage to dry goods, cutlery or other hardware, the loss shall be ascertained by a separation and sale of the portion only of the contents of the packages so damaged, and not otherwise; and the same practice shall obtain as to all other merchandise as far as practicable. Not liable for leakage on molasses or other liquids unless occasioned by stranding or collision with another vessel.

If the voyage aforesaid shall have been begun and shall have terminated before the date of this policy, then there shall be no return of premium on account of such termination of the voyage.

In all cases of return of premium, in whole or in part, one-
19 half per cent., upon the sum insured, is to be retained by the assurers.

$200,000. Two hundred thousand dollars. W. H. H. M., V. P. J. L. L.

(Signed) W. H. H. MOORE,
V. President.

(Signed) J. H. CHAPMAN, *Secretary.*

Additional, $—.

—— ——, *President.*

—— ——, *Secretary.*

Additional, $—.

—— ——, *President.*

—— ——, *Secretary.*

Additional, $—.

—— ——, *President.*

—— ——, *Secretary.*

Filed May 31, '95.
(Signed) G. H. FLEMING, *D'y Cl.*

Endorsed.

Premium and loss (if any) payable in gold.

Sept. 5, 1893.

Atlantic Mutual Insurance Company.

E. Allgeyer & Co.

Texas, etc., to Gt. Britain, etc.
(New Orleans.)

Vessel or vessels, ——.
Cargo, ——.

$200,000 at 1 per cent	$2,000	
Policy	1	25
Premium	$2,001	25

To be paid in gold.

—— additional, $—.
—— additional, $—.
—— additional, $—.
—— additional, $—.
—— additional, $—.
—— additional, $—.
—— additional, $—.
40256.
—— additional, $—.

STATE
vs.
ALLGEYER.

"A."

Record 117, folio 26474.
Filed Nov. 27, '93.
(Signed) JULES VIENNE, *D'y Cl.*

11888. Filed Sept. 2nd, 1895.
(Signed) PAUL E. MORTIMER, *D'y Clerk.*

Submission of Case.

(Extracts from the Minutes, November 21st, 1895.)

NEW ORLEANS, THURSDAY, *November* 21*st*, 1895.

The court was duly opened pursuant to adjournment.

Present: Their honors Francis T. Nicholls, chief justice; Lynn B. Watkins, Samuel D. McEnery, Joseph A. Breaux, Henry C. Miller, associate justices.

STATE OF LOUISIANA
vs.
E. ALLGEYER & CO. } No. 11888.

This cause came on this day to be heard and was argued by counsel. Mr. E. Howard McCaleb, Jr., opened for the plaintiff and appellant, Mr. Branch K. Miller replied on behalf of the defendants and appellees, and Mr. McCaleb closed the argument; and,
21 the cause having been submitted to the court by counsel upon the briefs now on file for the respective parties, the court took time to consider.

Opinion of the Court.

(Filed December 16th, 1895.)

UNITED STATES OF AMERICA,
State of Louisiana.

Supreme Court of the State of Louisiana.

NEW ORLEANS, MONDAY, *December 16th*, 1895.

The court was duly opened pursuant to adjournment.

Present: Their honors Francis T. Nicholls, chief justice; Lynn B. Watkins, Samuel D. McEnery, Joseph A. Breaux, Henry C. Miller, associate justices.

His honor Mr. Justice McEnery pronounced the opinion and judgment of the court in the following case:

STATE OF LOUISIANA
vs.
E. ALLGEYER & CO. } No. 11888.

Appeal from the civil district court for the parish of Orleans.

This is a suit under act 66 of 1894, for the benefit of the charity hospitals of New Orleans and Shreveport, to compel the defendants to pay the sum of three thousand dollars for effecting for
22 themselves insurance in a foreign company which had no authorized agent in this State. The answer of the defendant substantially sets out as defenses that the open policy and the special insurances of shipments under the same are all New York contracts, and that the contract is beyond the jurisdiction of this court, there being no part of the contract which is to be performed elsewhere than in New York, and that no authority can be exercised upon persons, acts, or contracts which are beyond the limits of the State, and the exercise of such authority would be extraterritorial; that the act is in violation of the Federal Constitution, as it is an interference with commerce, and it deprives the defendants of the equal protection of the laws, and that the act also violates the constitution of the State of Louisiana for the reasons last assigned.

Act 66 of 1894 is as follows:

"That any person, firm or corporation who shall fill up, sign or

issue in this State any certificate of insurance under an open marine policy, or who in any manner whatever does any act in this State to effect for himself or for another, insurance on property, then in this State, in any marine insurance company which has not complied in all respects with the laws of this State, shall be subject to a fine of $1,000 for each offense, which shall be sued for in any competent court by the attorney general for the use and benefit of the charity hospitals in New Orleans and Shreveport."

The insurance was taken out on an open policy in the Atlantic Mutual Insurance Company on account of defendants and to cover cotton in bales, purchased and shipped by them, on which drafts are drawn for the purchase upon whom it may concern. The company is domiciled in New York and is engaged in the
23 business of marine insurance. It has appointed no agent in the State of Louisiana, and has not complied with the conditions prescribed by the laws of the State for conducting its business within the same. It is admitted that the defendants, on October 23rd, 1894, insured in said open policy one hundred bales of cotton, by mail communication, and that at the time of the mailing of the communication the cotton was situated within the limits of the State. When the communication was posted it had the effect, if the shipment was in accordance with the stipulations of the open policy, of insuring the cotton from that time.

As this case is the sequel of the case of State *vs.* Williams, 46th Ann., 922, we refer to that case for a full statement of the character of the transaction between defendants and the company and for the interpretation and construction placed upon the contract. It is sufficient to say here that in that case we held that an open policy of insurance, in which an aggregate amount is expressed, there are as many contracts of insurance as there are endorsements on the policy of separate shipments of goods. The open policy in this case is conceded to be a New York contract; hence the special insurance effected on the cotton complained of here was a New York contract. The insurance company has been doing business in effecting insurance on cotton in this State, and this is not an isolated instance. Whether the mode adopted by the company was designed to evade the laws of the State it is immaterial to determine. The effect of the contract has been to evade the laws of Louisiana, and act 66 of 1894 was doubtless intended to prevent just such contracts as the defendants entered into with the Atlantic Mutual Insurance Company.

There can be no doubt of the correctness of the proposition that the right to prohibit foreign corporations from doing business
24 in the State without complying with article 236 of the constitution carries with it the right to enforce the prohibition by appropriate legislation.

State *vs.* Williams, 46th Ann., 922.

Hooper *vs.* People of State of California, 155 U. S., 648, and cases cited.

We will here remark that this case effectually disposes of defendant's contention as to the unconstitutionality of the act, as an interference with commerce between the States and as being in violation of the 14th amendment to the Constitution of the United States.

As the act is in the enforcement of article 236 of the constitution of the State, we do not see wherein it violates that instrument.

The question presented is the simple proposition whether under the act a party while in the State can insure property in Louisiana in a foreign insurance company, which has not complied with the laws of the State, under an open policy—the special contract or insurance—and the open policy being contracts entered into beyond the limits of the State.

The power to forbid foreign insurance companies from doing business until they comply with prescribed conditions within the State necessarily carries with it the right to enforce this power by appropriate legislation. The State, therefore, has the right to prohibit its citizens from taking out an open policy covering special contracts of insurance in a foreign insurance company which has not complied with its laws.

State *vs.* Williams, 46th Ann., 922.

Frisbie *vs.* United States, 157th U. S., 165.

This legal proposition is fully stated in the case cited and
25 is elaborately argued and sustained in the case of Hooper *vs.* The People of California.

We are not dealing with the contract. If it be legal in New York, it is valid elsewhere. We are concerned only with the fact of its having been entered into by a citizen of Louisiana while within her limits, affecting property within her territorial limits. It is the act of the party, and not the contract, which we are to consider. The defendants who made the contract did so while they were in the State, and it had reference to property located within the State. Such a contract is in violation of the laws of the State, and the defendants who made it were within the jurisdiction of the State and must be necessarily subject to its penalties, unless there is some inhibition in the Federal or State constitutions, or that it violates one of those inalienable rights relating to persons and property that are inherent, although not expressed, in the organic law. It does not forbid the carrying on by the insurance company of its legalized business within the State. It is a means of preventing its doing so without subscribing to certain conditions which are recognized as legitimate and proper. It does not destroy the constitutional right of the citizens of New York to do business within the State of Louisiana or of the citizens of Louisiana from insuring property. It says to the citizens of New York engaged in insurance business that they must, like its own citizens, pay a license and have an authorized agent in the State as prerequisite to their doing said business within its State, and it says to its own citizens, You shall not make a contract while in the State with any foreign insurance company which has not complied with the laws. You shall not in this manner contravene the public policy of the State

in aiding and assisting in the violation of the laws of the
26 State. The sovereignty of the State would be a mockery if it had not the power to compel its citizens to respect its laws.

In the case of Commonwealth *vs.* Biddle, 139 Penn., 605, it was held: "Beyond the limitations imposed by the constitution, the power of the legislature to declare any acts done within the territory of the State unlawful or criminal cannot be questioned, and all considerations of wisdom or policy, of hardship, of difficulty, or even impossibility of general enforcement must be addressed to the law-making branch of the Government. We entertain, therefore, no doubt of the power of the legislature to make the insurance of his property in an unauthorized foreign company by an owner criminal if done in this State."

The defendants while in the State undoubtedly insured their property located in the State in a foreign insurance company under an open policy.

The instant the letter or communication was mailed or telegraphed the property was insured. The act of insurance was done within the State and the offense denounced by the statute was complete.

In the case referred to of Hooper *vs.* People of State of California the court reviewed a statute of California similar in some respects to the one now under consideration. The California statute says: "Every person who in this State procures or agrees to procure any insurance for a resident of this State from any insurance company not incorporated under the laws of this State, unless such company or its agent has filed the bond required by the laws of this State relative to insurance, is guilty of a misdemeanor."

C. D. Mott, a resident of California, applied to one Hooper
27 for insurance on a vessel. Hooper was the agent of foreign insurance brokers, domiciled in New York. The insurance was placed by the foreign brokers. Hooper forwarded to his principals a telegram as follows: "Alliance, four thousand dollars, done in American form." The brokers forwarded to Hooper a policy in the China Mutual Insurance Company, insuring four thousand dollars on the steamer Alliance. Mott was prosecuted and convicted under the statute. The Supreme Court of the United States affirmed the conviction. In this case all the objections of defendants to the Louisiana statute have been met.

There is in the statute an apparent interference with the liberty of defendants in restricting their rights to place insurance on property of their own whenever and in what company they desired; but in exercising this liberty they would interfere with the policy of the State in forbidding insurance companies which had not complied with the laws of the State from doing business within its limits. Individual liberty of action must give way to the greater right of the collective people in the assertion of a well-defined policy, designed and intended for the general welfare.

One offense only under the statute has been proved.

It is therefore ordered, adjudged, and decreed that the judgment

appealed from be annulled, avoided, and reversed, and it is now ordered, adjudged, and decreed that the plaintiff, for the use of and benefit of the charity hospitals of New Orleans and Shreveport, do have and recover judgment against the defendants for one thousand dollars, with five per cent. interest from judicial demand, the defendants to pay all costs.

(*Syllabus.*)

Act No. 66 of 1894 does not violate the provisions of the State and Federal Constitution.

28 It is within the power of the State to forbid a citizen of the State doing any act in the State which violates the laws of the State.

If a party while in the State takes out an open policy in a marine insurance company domiciled out of the State, and which has not complied with the laws of the State for doing business within its territory, covering property situated within the State, he is liable to the penalty imposed by act 66 of 1894.

The mailing of a letter or telegraphing a communication by which instantly each shipment of goods is insured and the risk attached is doing an act in this State to effect insurance and comes within the act forbidden by the statute.

Final Judgment.

(Extract from the Minutes, December 16th, 1895.)

NEW ORLEANS, MONDAY, *December 16th*, 1895.

The court was duly opened pursuant to adjournment.

Present: Their honors Francis T. Nicholls, chief justice; Lynn B. Watkins, Samuel D. McEnery, Joseph A. Breaux, Henry C. Miller, associate justices.

His honor Mr. Justice McEnery pronounced the opinion and judgment of *of* the court in the following case:

STATE OF LOUISIANA
vs.
E. ALLGEYER & CO. } No. 11888.

On appeal from the civil district court for the parish of Orleans.

It is ordered, adjudged, and decreed that the judgment appealed from be annulled, avoided, and reversed, and it is now ordered, adjudged, and decreed that the plaintiff, for the use of and benefit of the charity hospitals of New Orleans and Shreveport, do have

29 and recover judgment against the defendants for one thousand dollars, with five per cent. interest from judicial demand, the defendants to pay all costs.

Petition for Rehearing.

Filed January 6th, 1896.

STATE OF LOUISIANA
vs.
E. ALLGEYER AND COMPANY. } No. 11888.

To the honorable the chief justice and associate justices of the supreme court of the State of Louisiana:

The petition of defendant respectfully prays for a rehearing in this case on the following grounds, to wit:

That the court erred in holding that act No. 66 of 1894 was a valid and constitutional statute and not violative of the Constitution of the United States in the particulars charged in defendant's answer herein.

Wherefore petitioner prays that a rehearing be granted in the above case.

(Signed) BRANCH K. MILLER,
Attorney for Petitioner.

Motion and Order for Time to File Briefs.

(Extract from the Minutes, January 6th, 1896.)

NEW ORLEANS, MONDAY, *January 6th*, 1896.

The court was duly opened pursuant to adjournment.

Present: Their honors Francis T. Nicholls, chief justice;
30 Lynn B. Watkins, Samuel D. McEnery, Joseph A. Breaux, Henry C. Miller, associate justices.

STATE OF LOUISIANA
vs.
E. ALLGEYER AND COMPANY. } No. 11888.

On motion of Branch K. Miller, of counsel for the defendants and appellees, it is ordered that the defendants be granted a delay of three days within which to file a brief in support of their petition for a rehearing in this case.

Rehearing Refused.

(Extract from the Minutes, January 20th, 1896.)

NEW ORLEANS, MONDAY, *January 20th*, 1896.

The court was duly opened pursuant to adjournment.

Present: Their honors Francis T. Nicholls, chief justice; Lynn B. Watkins, Samuel D. McEnery, Joseph A. Breaux, Henry C. Miller, associate justices.

STATE OF LOUISIANA
vs.
E. ALLGEYER AND CO. } No. 11888.

It is ordered that the rehearing applied for in this case be refused.

31 *Copy of Writ of Error.*

E. ALLGEYER & CO.
vs.
STATE OF LOUISIANA. } No. 11888.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of Louisiana, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court in the suit in which The State of Louisiana is plaintiff and E. Allgeyer & Co., a commercial partnership, *in* defendant, No. — of the docket of said court, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between said above-named parties, the said commercial partnership of E. Allgeyer & Co. being domiciled in the city of New Orleans, State of Louisiana, and composed of Charles E. Allgeyer, Ernest Siegfried, Réné Block, Charles A. Marande, and Olivier Sera, trading under the name and style of E. Allgeyer & Co., wherein was drawn in question the validity — an authority exercised under the United States and the decision was against its validity, or wherein was drawn in question the validity of a statute or of an authority exercised under said State, on the ground of their being repugnant to the Constitution or laws of the United States,
32 and the decision was in favor of such their validity, or wherein was drawn in question the construction of the clause of the Constitution or of a treaty or statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said commercial partnership of E. Allgeyer & Co., as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington within 30 days from date hereof, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of

right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 30th day of January, in the year of our Lord one thousand eight hundred and ninety-six.

(Signed) E. R. HUNT,
Clerk of the Circuit Court of the United States for the Eastern District of Louisiana. [SEAL.]

Allowed by—
(Signed) FRANCIS T. NICHOLLS,
Chief Justice.

Endorsed: Copy of writ of error lodged in the clerk's
33 office of the supreme court of Louisiana, in pursuance of the statute in such cases made and provided, this 30th day of January, one thousand eight hundred and ninety-six. (Signed) Branch K. Miller, attorney of plaintiff in error. Filed January 30th, 1896. (Signed) Paul E. Mortimer, d'y clerk.

Bond for Writ of Error.

Filed January 30th, 1896.

E. ALLGEYER & Co.
vs.
STATE OF LOUISIANA. } No. 11888. Supreme Court of Louisiana.

Know all men by these presents that we, E. Allgeyer & Co., a commercial partnership domiciled in the city of New Orleans, State of Louisiana, and composed of Charles E. Allgeyer, Ernest Siegfried, Rene Block, Charles A. Marande, & Olivier Sera, as principal, and Fernand Lapeyre, as surety, are held and firmly bound unto The State of Louisiana in the full and just sum of twenty-five hundred dollars, to be paid to the said State of Louisiana,— certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 30th day of January, in the year of our Lord one thousand eight hundred and ninety-six.

34 Whereas lately, in the supreme court of Louisiana, in a suit depending in said court wherein The State of Louisiana is plaintiff and said E. Allgeyer & Co. is defendant, judgment was rendered against said defendant, E. Allgeyer & Co., and the said E. Allgeyer & Co. having obtained a writ of error and filed a copy thereof in the clerk's office of the said supreme court of Louisiana to reverse the judgment in the aforesaid suit, and a citation directed to the said State of Louisiana, citing and admonishing it to be and appear at the Supreme Court of the United States, to be holden at Washington within thirty days from January 30th, 1896:

Now, the condition of the above obligation is such that if the said E. Allgeyer & Co. shall prosecute their writ to effect and answer all

damages and cost if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

(Signed) E. ALLGEYER & CO. [L. S.]
" F. LAPEYRE. [L. S.]

Sealed and delivered in the presence of—
(Signed) P. ROBELOT.
" J. G. EUSTIS.

Approved:
FRANCIS T. NICHOLLS,
Chief Justice.

UNITED STATES OF AMERICA. }
Eastern District of Louisiana, } *ss:*

Personally appeared Fernand Lapeyre, who, being duly sworn, deposes and says that he is the surety on the within bond; that he resides — New Orleans, La., and is worth the full sum of twenty-five hundred dollars over and above all his debts and liabilities and property exempt from execution.

(Signed) F. LAPEYRE.

35 Subscribed and sworn before me this 31st day of January, 1896.

[SEAL.] (Signed) J. G. EUSTIS, *Not. Pub.*

36 STATE OF LOUISIANA }
vs. } No. —. Supreme Court.
E. ALLGEYER AND COMPANY. }

Assignment of Errors.

Defendant in this cause, in connection with its petition for a writ of error, makes the following assignment of errors, which it avers are to be found in the opinion, judgment, and decree of this honorable court herein:

1. That the court erred in holding that act No. 66 of the General Assembly of the State of Louisiana of the year 1894, approved July 6th, 1894, is not in violation of the 14th amendment of the Constitution of the United States.

2. That the court erred in holding that the said statute does not deprive defendant of its property without due process of law, and that the said statute does not deny to defendant the equal protection of the laws.

3. That the court erred in holding that the said statute does not restrain or deprive defendant of its liberty and freedom to contract, in violation of the Constitution of the United States.

4. That the court erred in holding that the said statute is not violative of the Constitution of the United States in that it deprives it of the right to use the post-office and mails, which are within the exclusive jurisdiction of Congress or of the United States, and the

use and employment of which cannot be hampered or prevented by any statute of the State of Louisiana.

37 5. That the court erred in holding that the said statute is not violative of the Constitution of the United States by reason of its being a regulation of or interference with commerce with foreign nations and the several States, or commerce between persons residing within the State of Louisiana and persons residing in other States of the Union, or in foreign countries.

6. That the court erred in rendering a decree and entering judgment herein in favor of plaintiff and against defendant.

BRANCH K. MILLER,
Attorney for Defendant.

37½ [Endorsed.] No. 11888. Supreme court. State of Louisiana *vs.* E. Allgeyer and Company. Assignment of errors. Branch K. Miller, att'y. Filed January 28th, 1896. Paul E. Mortimer.

38 STATE OF LOUISIANA
vs.
E. ALLGEYER AND COMPANY. } No. —. Supreme Court.

To the honorable the chief justice and associate justices of the supreme court of the State of Louisiana:

The petition of E. Allgeyer and Company, defendant and appellant in the above entitled and numbered case, respectfully shows—

That on the *Dec.* 16th day of December, 1895, this honorable court rendered a decree and entered judgment herein in favor of plaintiff and against this defendant, which said decree and judgment became final on January 20th, 1896.

That in said judgment and decree and the proceedings prior thereto certain errors were committed to the prejudice of this defendant, all of which will more in detail appear from the assignment of errors which is filed with this petition.

That in this case defendant has claimed rights, privileges, and immunities under the Constitution of the United States, and that the decree and judgment of this honorable court is adverse to the same.

That defendant has drawn in question the validity of act No. 66 of the General Assembly of the State of Louisiana of its session of the year 1894, approved July 6th, 1894, on the ground of its being repugnant to the Constitution of the United States, and that the decree and judgment of this honorable court is in favor of

39 the validity of said statute, wherein a manifest error has happened, to the great damage of petitioner.

That petitioner desires a writ of error from the said decree and judgment of this honorable court to the Supreme Court of the United States.

Wherefore petitioner prays that a writ of error to operate as a supersedeas may issue in this behalf to the Supreme Court of the

United States for the correction of errors so contained, and that a transcript of the record of the proceedings and papers in this case, duly authenticated, may be sent to the said Supreme Court of the United States.

BRANCH K. MILLER,
Attorney for Defendants.

Let the writ issue. Bond fixed at twenty-five hundred dollars.
FRANCIS T. NICHOLLS,
Chief Justice.

39½ [Endorsed:] No. 11888. Supreme court. State of Louisiana *vs.* E. Allgeyer and Company. Application for writ of error. Branch K. Miller, att'y. Filed January 28th, 1896. Paul E. Mortimer.

40 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of Louisiana, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court in the suit in which The State of Louisiana is plaintiff and E. Allgeyer & Co., a commercial partnership, is defendant, No. — of the docket of said court, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between said above-named parties, the said commercial partnership of E. Allgeyer & Co. being domiciled in the city of New Orleans, State of Louisiana, and composed of Charles E. Allgeyer, Ernest Siegfried, Rene Block, Charles A. Marandé, and Olivier Sera, trading under the name and style of E. Allgeyer & Co., wherein was drawn in question the validity of an authority exercised under the United States and the decision was against its validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of the clause of the Con-

41 stitution or of a treaty or statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said commercial partnership of E. Allgeyer & Co., as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, within 30 days

from date hereof, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 30th day of January, in the year of our Lord one thousand eight hundred and ninety-six.

{ Seal U. S. Circuit Court for the 5th Circuit & Eastern District of La. }

E. R. HUNT,
Clerk of the Circuit Court of the United States for the Eastern District of Louisiana.

Allowed by—
FRANCIS D. NICHOLLS,
Chief Justice.

42 [Endorsed:] No. 11888. State of Louisiana *versus* E. Allgeyer & Co. Writ of error. Filed January 30th, 1896. Paul E. Mortimer, d'y clerk.

42½ THE UNITED STATES OF AMERICA:

Supreme Court of the State of Louisiana.

The President of the United States to the State of Louisiana, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at the city of Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Louisiana, at New Orleans, wherein E. Allgeyer & Co., a commercial partnership domiciled in the city of New Orleans, State of Louisiana, and composed of Charles E. Allgeyer, Ernest Siegfried, Rene Bloch, Charles A. Marande, and Oliver Sera, is plaintiff in error and The State of Louisiana is defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 30th day of January, in the year of our Lord one thousand eight hundred and ninety-six.

[Seal Supreme Court of the State of Louisiana.]

FRANCIS T. NICHOLLS,
Chief Justice of the Supreme Court of the State of Louisiana.

42¾ [Endorsed:] 44648. Supreme court of the State of Louisiana. No. 11888. State of Louisiana *vs.* E. Allgeyer & Co. Citation. Filed February 6th, 1896. Paul E. Mortimer, d'y clerk.

Sheriff's Return.

Received on the 5th day of February, 1896, a duly certified copy of the within citation of appeal, and on the same day, month, and year served said copy on Murphy J. Foster, governor of the State of Louisiana, in person, at his office, in the state-house, in the city of Baton Rouge, parish of East Baton Rouge, said State.

WM. S. BOOTH,
D'y Sh'ff, Parish of East Baton Rouge.

Sworn to and subscribed before me this 5th day of February, A. D. 1896.

{ Seal 15th Judicial District Court, Parish of East Baton Rouge, State of Louisiana. }

F. A. WOODS,
D'y Clerk 15 Jud. Dist. Court, Parish of East Baton Rouge, State of Louisiana.

43 *Clerk's Certificate.*

UNITED STATES OF AMERICA, }
State of Louisiana. }

Supreme Court of the State of Louisiana.

I, Thomas McCabe Hyman, clerk of the supreme court of the State of Louisiana, do hereby certify that the foregoing forty-two pages contain a full, true, and complete copy of the transcript of the proceedings had in the civil district court for the parish of Orleans in a certain suit wherein The State of Louisiana was plaintiff and E. Allgeyer & Co. were defendants, and also of all the proceedings had in this supreme court on the appeal taken by the said plaintiff, which appeal is now on the files thereof under number 11888.

Seal Supreme Court of the State of Louisiana.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at the city of New Orleans, this eighth day of February, anno Domini one thousand eight hundred and ninety-six, and in the one hundred and twentieth year of the Independence of the United States of America.

T. McC. HYMAN, *Clerk.*

44 *Certificate of the Chief Justice.*

UNITED STATES OF AMERICA, }
State of Louisiana. }

Supreme Court of the State of Louisiana.

I, Francis Tillou Nicholls, chief justice of the supreme court of the State of Louisiana, do hereby certify that Thomas McCabe Hyman is clerk of the supreme court of the State of Louisiana;

that the signature of Thomas McCabe Hyman to the within certificate in the case of State of Louisiana *vs.* E. Allgeyer & Co., No. 11888 of the docket of this court, is in the proper handwriting of him, the said clerk; that said certificate is in due form of law, and that full faith and credit are due to all of his official acts as such.

Seal Supreme Court of the State of Louisiana.

In testimony whereof I have hereunto set my hand and seal, at the city of New Orleans, this eighth day of February, anno Domini one thousand eight hundred and ninety-six, and in the one hundred and twentieth year of the Independence of the United States of America.

FRANCIS T. NICHOLLS.
Chief Justice.

Endorsed on cover: Case No. 16,190. Louisiana supreme court. Term No., 446. E. Allgeyer & Company, a commercial partnership, composed of Charles E. Allgeyer, Ernest Siegfried, Réné Block, Charles A. Marandè, & Olivier Sera, plaintiffs in error, *vs.* The State of Louisiana. Filed February 15, 1896.

165-578

165-578.

DEC 11 1896
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1896.

No. 446.

E. ALLGEYER & CO., PLAINTIFFS IN ERROR,

vs.

THE STATE OF LOUISIANA.

BRIEF FOR THE PLAINTIFFS IN ERROR.

BRANCH K. MILLER,
Attorney for Plaintiffs in Error.

(16,190)

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1896.

No. 446.

E. ALLGEYER AND CO., A COMMERCIAL PARTNERSHIP COMPOSED OF CHARLES E. ALLGEYER, ERNEST SIEGFRIED, RENE BLOCK, CHARLES A. MARANDE, AND OLIVIER SERA, PLAINTIFFS IN ERROR,

vs.

THE STATE OF LOUISIANA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

STATEMENT OF PLEADINGS AND FACTS.

Plaintiffs in error are sued for three thousand dollars, the amount of certain civil penalties, which the state of Louisiana charges to have been incurred, by three certain violations of a statute, known as Act No. 66 of the session of the General Assembly of the state of Louisiana of the year 1894; the statute is as follows:

"AN ACT, to prevent persons, corporations, or firms, from dealing with marine insurance companies, that have not complied with law.

"SECTION 1. *Be it enacted by the General Assembly of the state of Louisiana*, That any person, firm or corporation who shall fill up, sign or issue, in this state, any certificate of insurance under an open marine policy, or who in any manner whatever, does any act in this state, to effect, for himself or for another, insurance on property, then in this state, in any marine insurance company which has not complied in all respects with the laws of this state, shall be subject to a fine of one thousand dollars for each offense, which shall be sued for in any competent court by the Attorney General, for the use and benefit of the charity hospitals in New Orleans and Shreveport.

"SECTION 2. *Be it enacted, etc.*, That all laws or parts of laws in conflict herewith are hereby repealed."

The acts relied upon to sustain the charge of the State, are:

First. That plaintiffs in error, on the 27th of October, 1894, effected insurance for themselves, on property situated in the state of Louisiana, in the Atlantic Mutual Insurance Company, of New York, a corporation organized and doing business in the state of New York, and not domiciled or doing business in the state of Louisiana.

Second. That the plaintiffs in error mailed and issued a letter of advice, or a certificate of marine insurance, on the date given, advising the said insurance company of the shipment of one hundred bales of cotton to foreign ports, in accordance with the terms of an open marine policy, made between plaintiffs in error and the company, the cotton at the time being located in the city of New Orleans, state of Louisiana.

Third. That under the terms of the open policy, no in-

surance was effected on the said cotton until the letter or certificate was mailed.

Fourth. That the company had no authorized agent in the state of Louisiana, and had not complied with the laws thereof, and especially with article 236 of the Constitution, which is as follows:

"No foreign corporation shall do any business in this State, without having one or more known places of business and an authorized agent or agents in the State upon whom process may be served."

Two transactions of a like nature, between plaintiffs in error and the insurance company are alleged to have taken place on two other several dates; the three are claimed to have been violations of the act of 1894, and the statutory penalty of one thousand dollars for each offense is sued for.

In the court of first instance, defendants, after pleading the general issue, set up that Act No. 66 of 1894 was unconstitutional, null and void, being in violation of the Constitution of the United States, in that it deprived defendants of their property without due process of law, and denied to them the equal protection of the laws; that the business concerning which the penalty was sought to be enforced, and the contracts made in reference thereto, were beyond the jurisdiction of the State of Louisiana, and not amenable to any penalties imposed by its laws; that the contracts of insurance were made in the State of New York, where the premiums were paid, and where the losses, if any, were also to be paid; that they were New York contracts, and that under the Federal Constitution, the defendants had the right to do and perform any acts in the State of Louisiana, which were necessary and proper for the execution of its contracts made elsewhere, and so far as Act No. 66 of 1894 might be construed so as to prevent or interfere with the execution of such contract, it was violative of the Federal Constitution.

In the Civil District Court for the Parish of Orleans, in which the suit was instituted, the case was tried upon an agreed statement of facts, which is as follows:

That the defendants made with the Atlantic Mutual Insurance Company, a corporation created by the laws of the state of New York, and domiciled and carrying on business in the city of New York, in said state, the contract evidenced by the policy of insurance attached to the agreement as part hereof as Exhibit "A."

That the Atlantic Mutual Insurance Company is engaged in the business of marine insurance, has appointed no agent in the state of Louisiana, and has not complied with the conditions required by the laws of this state for the doing of business within the same, by insurance companies incorporated and domiciled out of the state.

That on October 23rd, 1894, the defendants mailed to said company a communication the tenor and form of which is shown by Exhibit "B" attached to and made part of the agreement. At the time of the mailing of the said communication the cotton referred to by it, to wit, one hundred bales, was within the state of Louisiana.

That the premiums to be paid under said contract of insurance and the loss or losses under the same are payable in the city of New York, the said premiums being remitted by defendants from New Orleans by exchange.

That defendants are exporters of cotton from the port of New Orleans to ports in Great Britain and on the continent of Europe; they sell cotton in New Orleans to purchasers at said ports. For the price of every sale of cotton made by them they, in accordance with the general custom of business, draw a bill of exchange against the purchaser for the price, attaching to the same bill of lading for the cotton and an order of the Atlantic Mutual Insurance Company for a new and separate policy of insurance, spoken of in the policy marked Exhibit "A," the form of said order being that

shown by Exhibit "C," attached as part hereof. This bill of exchange, with the bill of lading attached, is sometimes negotiated with banks in the city of New York; sometimes it is not negotiated at all, but forwarded direct for collection from the purchaser of the cotton. The bill of exchange, with the bill of lading, and order for insurance attached, in either case is sent from New Orleans first to New York, where, after its negotiation, or before being forwarded from thence for collection, the order for insurance is presented to the Atlantic Mutual Insurance Company. Upon this showing the insurance company in New York issues and delivers to the holder of the exchange and bill of lading, when the former has been negotiated, or to the agent of defendants when the exchange has not been negotiated, a new and a separate policy of insurance for the cotton, in accordance with the contract made with the defendants and evidenced by the policy attached to this statement as part hereof as Exhibit "A." This new and separate policy, when received, is attached to the bill of exchange. The exchange cannot be negotiated in New York unless it is accompanied by both the bill of lading and order for insurance, and unless the new and separate policy issued by the company is attached to it the purchaser of the cotton is under no obligation to pay the bill drawn on him for the price of the cotton. The new and separate policy delivered to the holder of the exchange and bill of lading in New York, or to defendants' agent there, as the case may be, is for the benefit of the holder of the latter, or of defendants, according as the exchange has been negotiated or not. The holder of the exchange becomes the owner of the cotton covered by the bill of lading attached, and is the owner of the policy of insurance covering the same, in the event of a loss within the terms of the policy.

The business thus described is conducted as above by the general custom and agreement of all parties concerned.

EXHIBIT "A."

Policy of Insurance.

By the Atlantic Mutual Insurance Company.

(Cargo.) (No. 26474.)

E. Allgeyer & Co., on account of themselves; and to cover cotton in bales, purchased and shipped by them, on which drafts are drawn for the purchase, upon whom it may concern—

(327,671.)

New Orleans.

Loss, if any, to be paid in gold to E. Allgeyer & Co.

Do make insurance, and cause to be insured, lost or not lost, at and from ports and places in Texas, Louisiana, Mississippi, Alabama, Georgia, Arkansas, Missouri, or Tennessee, to the mills in the New England or Middle states when destined to such mills, with liberty to transship one or more times; or to port or ports in the United Kingdom of Great Britain or on the Continent of Europe between Hamburg and Trieste both inclusive, direct or by steamers only via New York, Boston, Philadelphia or Baltimore, for transshipment; or to Gothenburg, direct, or by steamers only via New York, Boston, Philadelphia, or Baltimore, for transshipment by the usual routes, including the risk of fire prior to shipment, the risk to attach upon the cotton becoming the property of E. Allgeyer and Company, and at their risk, and to attach on or after September 1st, 1893, and prior to September 1st, 1894—

Shipments applicable to this policy to be reported to this company by mail or telegraph on day of purchase—

Warranted not to cover cotton in charge of carriers on shore or during inland transportation.—

On cotton in bales.

(Matter enclosed between rules erased in copy.)

No risk is to be insured by this policy until a letter signed by —— —— and addressed to the president of this company, detailing name of vessel, particulars of shipment, with description of the property and amount to be insured, is deposited in the post-office at ——, which must be done while the property is in good safety, and in all cases prior to the departure of the risk from ——; a duplicate of such letter to be sent by the following mail.

(Written across the face:) W. H. H. M. V. P.

A new and separate policy to be issued for each risk, the premium on which is to be paid in cash upon the delivery of such policy in New York to E. Allgeyer & Co.—

Risks endorsed hereon and subsequently taken off, and new and separate policies issued, are not to exhaust this policy.

Vessel or vessels and conveyances upon all kinds of lawful goods and merchandise, laden or to be laden upon the good shipments —— to be made on or after September 1st, 1893 and prior to September 1st, 1894, whereof is master for the present voyage —— ——, or whoever else shall go for master in the said vessel, or by whatever other name or names the said vessel, or the master thereof, is or shall be named or called.

Sum insured $200,000. Each ten bales cotton, successive numbers in the order of invoice, subject to their own particular average as if separately insured, and when not numbered,

Beginning the adventure upon the said goods and merchandises, from and immediately following the loading thereof on board of the said vessel, at as aforesaid, and so shall continue and endure until the said goods and mer-

then each mark of not less than ten bales subject to its own particular average as if separately insured.

Premium....	$2,000.00
Policy	1.25
	$2,001.25

Warranted free from claims for country damage, or damage from exposure during inland transportation or previous to loading. It is by the assured expressly stipulated in respect to land carriers, that no right of subrogation is or is to be, abrogated or impaired by or through any agreement intended to relieve a carrier from duties or obligations imposed or recognized by the common law or otherwise.

In case of loss prior to issue of certificate or policy and negotiation of exchange for purchase of cotton, the liability under this insurance is not to exceed the cost of the cotton and charges added; except in cases where the assured is compelled by his contract to replace the cotton destroyed; in which cases the actual cost — the new cotton and of placing

chandises shall be safely landed at as aforesaid. And it shall and may be lawful for the said vessel, in her voyage, to proceed and sail to, touch and stay at, any ports or places, if thereunto obliged by stress of weather, or other unavoidable accident, without prejudice to this insurance.

The said goods and merchandises, hereby insured are valued including premiums at the sums expressed in the letter of advice as provided for herein not to exceed the invoice cost and fifteen per cent.

Touching the adventures and perils which the said Atlantic Mutual Insurance Company is contented to bear, and takes upon itself in this voyage, they are of the seas, men-of-war, fires, enemies, pirates, rovers, thieves, jettisons, letters of marque and counter-marque, reprisals, takings at sea, arrests, restraints and detainments of all kings, princes or people, of what nation, condition or quality soever, barratry of the master and mariners, and all other perils, losses and misfortunes, that have or shall come to the hurt, detriment or damage of the said goods and merchandises or any part thereof. And in case of any loss or misfortune it shall be lawful and necessary to and for the assured, — factors, servants and assigns, to sue, labor, and travel for, in and about the defense, safeguard and recovery of the said goods and mer-

it where the old cotton was lost, shall be the limit of claim, provided it does not exceed the sum insured.

chandises or any part thereof, without prejudice to this insurance; nor shall the acts of the insured or insurers, in recovering, saving and preserving the property insured, in case of disaster, be considered a waiver or an acceptance of an abandonment; to the charges whereof, the said insurance company will contribute according to the rate and quantity of the sum herein insured; having been paid the consideration for this insurance, by the assured or — assigns at and after the rate of one per cent. on the subscribed amount of this policy on account. Payable in gold.

The amount of risk under this policy is not — exceed $100,000 by any one steamer at one time, nor more than $50,000 against the risk of fire in any depots, yards, presses, on wharf, pier or in railroad depot, at any one time.

The company are to be entitled to premium on all shipments reported as provided for above. The rate of premium shall be fixed by the president or the vice-president of the company, when the vessel and nature of the risks are known and understood, charges and expenses in currency to be reduced to the standard of gold. Each party at liberty to cancel this policy upon giving the other ten days' notice of intention so to do. An approved note to be given for the premium note on this policy.

The amount of risk under this policy is not to exceed $—— by any one vessel.

(11.) Warranted by the assured free from claim on account of capture, seizure, detention or destruction, by or arising from any belligerent nation, or by or from any officer, civil or military, or other person claiming to act in their name, or

And in case of loss, such loss to be paid in thirty days after proof of loss, and proof of interest in the said — (the amount of the note given for the premium, if unpaid, being first deducted), but no partial loss or particular average shall in any case be paid, unless amounting to five per cent. Provided always, and it is hereby fur-

under their authority, or in their behalf.

(18.) Proof of loss to be authenticated by the agent of the company, if there be one at the place such proofs are taken.

(19.) Charges and expenses in currency to be reduced to the standard of gold.

(25.) Dividend of profits, if any, may be declared on the amount of premium terminated and marked off by the company, the same as if the premium was in currency, and for such purpose a dollar in gold will be treated as a dollar in currency, and this insurance is accepted on these terms.

ther agreed, that if the said assured shall have made any other assurance upon the premises aforesaid, prior in the day of date to this policy, then the said Atlantic Mutual Insurance Company shall be answerable only for so much as the amount of such prior assurance may be deficient towards fully covering the premises hereby assured; and the said Atlantic Mutual Insurance Company shall return the premium upon so much of the sum by them assured, as they shall be by such prior assurance exonerated from. And in case of any insurance upon the said premises, subsequent in day of date to this policy, the said Atlantic Mutual Insurance Company shall nevertheless be answerable for the full extent of the sum by them subscribed hereto, without right to claim contribution from such subsequent assurers, and shall accordingly be entitled to retain the premium by them received, in the same manner as if no such subsequent assurance had been made. Other insurance upon the premises aforesaid, of date the same day as this policy, shall be deemed simultaneous herewith and the said Atlantic Mutual Insurance Company shall not be liable for more than a ratable contribution in the proportion of the sum by them insured to the aggregate of such simultaneous insurance. It is also agreed, that the property be warranted by the assured free from any charge, damage or loss, which may arise in consequence of a seizure or detention, for or on account of any illicit or prohibited trade, or any trade in articles contraband of war.

Warranted not to abandon in case of capture, seizure or

detention, until after condemnation of the property insured; nor until ninety days after notice of said condemnation is given to this company. Also warranted not to abandon in case of blockade, and free from any expense in consequence of capture, seizure, detention or blockade; but in the event of blockade, to be at liberty to proceed to an open port and there end the voyage.

In witness whereof the president or vice-president of the said Atlantic Mutual Insurance Company hath hereunto subscribed his name, and the sum insured, and caused the same to be attested by their secretary, in New York, the 5th day of September, one thousand eight hundred and ninety-three.

MEMORANDUM—It is also agreed, that bar, bundle, rod, hoop and sheet iron, wire of all kinds, tin plates, steel, madder, sumac, wicker-ware and willow, (manufactured or otherwise), salt, grain of all kinds, tobacco, Indian meal, fruits, (whether preserved or otherwise), cheese, dry fish, hay, vegetables and roots, rags, hempen yarn, bags, cotton bagging, and other articles used for hides, musical instruments, looking-glasses, and all other articles that are perishable in their own nature, are warranted by the assured free from average, unless general; hemp, tobacco stems, matting and cassia, except in boxes, free from average under twenty per cent., unless general; and sugar, flax, flaxseed and bread, are warranted by the assured free from average under seven per cent., unless general; and coffee, in bags or bulk, pepper in bags or bulk, and rice free from average under ten per cent., unless general.

Warranted by the insured free from damage or injury, from dampness, change of flavor, or being spotted, discolored, musty or mouldy, except caused by actual contact of sea water with the articles damaged, occasioned by sea perils. In case of partial loss by seam damage to dry goods, cutlery or other hardware, the loss shall be ascertained by a separation and sale of the portion only of the

contents of the packages so damaged, and not otherwise; and the same practice shall obtain as to all other merchandise as far as practicable. Not liable for leakage on molasses or other liquids, unless occasioned by stranding or collision with another vessel.

If the voyage aforesaid shall have been begun and shall have terminated before the date of this policy, then there shall be no return of premium on account of such termination of the voyage.

In all cases of return of premium, in whole or in part, one-half per cent. upon the sum insured, is to be retained by assurers.

$200,000. Two hundred thousand dollars.

W. H. H. M. V. P. J. L. L.

Communication, dated October 3rd, 1894, to insurance company, attached to agreement, marked Exhibit "B."

"Insurance is wanted by E. Allgeyer & Co., for account of same, loss, if any, payable at Paris, in French currency, computed at the rate of twenty cents, United States currency, to the franc, to —— —— or order by J. S. Morgan & Co. upon surrender to them, in London, of this policy with an adjustment of the loss made by Frederick Wood, of Havre, France.

For $3,400.00, on one hundred b. c. on board of steamer ——, —— —— master, and to be insured at and from L. Rock to N. Orleans per R. R., and thence per steamer to Havre.

Fast: 100 b. c. for thirty-four hundred dollars.

Charges and expenses in currency to be reduced to the standard of gold; bill of lading dated ——; premium, — per cent., payable in gold; time of sailing, ——.

Binding.

189 (Signed) E. Allgeyer, *Applicant*,
Per P. Roubelot.

N. Orleans, *October 22nd*, 1894."

And on the face of said communication appears the following inscription:

"Warranted by the assured that vessels to be loaded with grain from the ports of New York, Philadelphia, or Baltimore, for foreign ports, are to be loaded under the inspection of the surveyor of the board of underwriters and his certificate as to their proper loading and seaworthiness obtained."

And it further appears:

"Warranted by the assured free from claim on account of capture, seizure, detention, or destruction by or arising from any belligerent nation or by or from any officer, civil or military, or other person claiming to act in their name or under their authority or in their behalf."

Order on the Atlantic Mutual Insurance Company for a New and Separate Policy of Insurance, Attached to Agreement, Marked "C."

"Attached to draft No. — on —— —— from E. Allgeyer & Co., New Orleans, 189–, to Atlantic Mutual Insurance Company, New York.

Marks and numbers, ——.

Please deliver to —— —— or order special policy for $— on — bales cotton per —— from New Orleans to ——.

Respectfully,

(Signed) E. ALLGEYER AND CO.,

Per —— ——."

After a judgment of the District Court, sustaining the defense, the state, by appeal, carried the cause to the Supreme Court of the state; by that court, the judgment of the District Court was reversed, and a decree entered against defendants for one thousand dollars, with interest, the proof showing only a single transaction by defendants upon which could be predicated any violation of the act of 1894; the

opinion and decree of the court will be found reported in the 48th volume of the Louisiana Annual Reports, p. 104.

The conclusions of the court are based upon the following propositions, which are found in the opinion, and repeated in the syllabus thereof, to wit:

First. That Act No. 66 of 1894 does not violate the provisions of the (state and) Federal Constitution.

Second. That it is within the power of the state, to forbid a citizen of the state, from doing any act in the state, which violates the laws of the state.

Third. If a party, while in the state, takes out an open policy in a marine insurance company domiciled out of the state, and which has not complied with the laws of the state for doing business within its territory, covering property situated within the state, he is liable for the penalty imposed by Act 66 of 1894.

Fourth. The mailing of a letter, or telegraphing a communication, by which instantly each shipment of goods is insured, and the risk attached, is doing an act in the state of Louisiana to effect insurance, and comes within the act forbidden by the statute.

It is publicly known, that the *syllabi* of the opinions of the Supreme Court of the state of Louisiana, are made by the justices who render the opinions.

After the refusal of a rehearing applied for by defendants, they sued out a writ of error, returnable to this court, making the following assignments of error:

ASSIGNMENT OF ERRORS.

First. That the court erred in holding that Act No. 66 of the General Assembly of the state of Louisiana of the year 1894, approved July 6, 1894, is not in violation of the 14th Amendment of the Constitution of the United States.

Second. That the court erred in holding, that the said statute does not deprive defendant of its property, without

due process of law, and that the said statute does not deny to defendant the equal protection of the laws.

Third. That the court erred in holding that the said statute does not restrain or deprive defendant of its liberty and freedom to contract, in violation of the Constitution of the United States.

Fourth. That the court erred in holding that the said statute is not violative of the Constitution of the United States in that it deprives it of the right to use the post-office and mails, which are within the exclusive jurisdiction of Congress or of the United States, and the use and employment of which cannot be hampered or prevented by any statute of the state of Louisiana.

Fifth. That the court erred in holding that the said statute is not violative of the Constitution of the United States, by reason of its being a regulation of, or interference with, commerce with foreign nations and the several states, or commerce between persons residing within the state of Louisiana and persons residing in other states of the Union, or in foreign countries.

Sixth. That the court erred in rendering a decree and entering judgment herein in favor of plaintiff and against defendant.

ARGUMENT.

By Article 236 of the Constitution of Louisiana, foreign corporations are prohibited from doing any business in the state, without having one or more known places of business, and an authorized agent or agents in the state, upon whom process may be served.

By the general revenue act of the year 1890, the General Assembly levied a graduated license tax upon all companies, associations, corporations, firms and individuals, conducting the business of life, fire, marine, river, accident, or other insurance, within the state; see Acts of 1890, pp. 196 *et seq.*; after classifying the business with reference to gross annual

receipts, section 7, imposing this tax, concluded with the *proviso*, that no corporation, not incorporated under the laws of the state, should do any business therein, except through a duly authorized agent, with full power for all purposes connected with licenses, taxation, and service of process, the agent to be appointed by an authentic act, a certified copy of which was required to be deposited with the secretary of state; further, that any person who should fill up or sign a policy or certificate of insurance, on open marine policy, or otherwise, issued by a corporation not located or represented in the state by a legally authorized agent, should be considered the agent of such corporation, and should be personally liable for all licenses, taxes and penalties imposed by the act.

Under this law, the state brought suit against a party, for the recovery of a license claimed to be due by the Atlantic Mutual Insurance Company, of New York, the defendant not being an agent of the company, but an assured of the same, under a contract of like character with that which is the basis of the present suit; defendant was treated as the agent of the company, under the proviso of section 7, and as such, sought to be held personally liable for the license tax claimed to be due by the company.

That suit was defended on the ground that the company was doing no business in the state of Louisiana, and had not entered it for any purpose; that the contract of insurance with reference to which the suit was brought, was made and completed in the state of New York, and was not within the jurisdiction of the state of Louisiana, or the authority of its laws; that the only act done within the state was the mailing of a letter, advising the company of each shipment applicable to the open policy; that this was the mere incident of a contract made and to be executed beyond the state of Louisiana, and was insufficient to place the contract of the parties thereto within the power of the

state, and in no respect constituted the doing of business within the state by the company.

This defense was sustained by the District Court in which the suit was instituted; the case being carried by appeal to the Supreme Court of the state, the judgment of the lower court was affirmed; the Supreme Court held, that the contract, identical, except in immaterial particulars, with the one concerned here, must be considered as having been made in New York; that the company, having no agent in Louisiana, could not be considered as doing business in that state.

The court, however, concluded its opinion with the following *dictum:*

"The state can (therefore) prohibit its own citizens from taking out an open policy, covering contracts of insurance in a foreign insurance company which has not complied with constitutional and statutory regulations. It has the exclusive right, by virtue of its sovereignty, to regulate the condition, capacity and state of all persons within it; the validity of contracts and other acts done within its limits; the resulting rights growing out of those contracts and acts, and the remedies and modes of enforcing justice and subjection to its will."

Story's Conflict of Laws, paragraph 18.
State of Louisiana *vs.* J. Herbert Williams, 46th La. Annual Reports, pp. 922 *et seq.*

The attempt to enforce the Act of 1890 being unsuccessful, presumably encouraged by the *dictum* above quoted from the opinion of the Supreme Court of the state of Louisiana, the General Assembly adopted Act No. 66 of 1894, to consummate the purpose sought to be accomplished by the statute of 1890.

The object of the law is fully shown in its title, which is, "To prevent persons, corporations or firms from dealing

with marine insurance companies that have not complied with the law."

It is a fair inference from the legislative and judicial history of the present controversy, that the real purpose of the Act of 1894 is to increase the state's revenue, by forcing all foreign insurance companies, with whom residents of Louisiana transact business of the character shown from the present case, to appoint resident agents, and thereby become amenable to a state license tax; the first attempt, found in the Act of 1890, was to make the assured the agent of the underwriter, a condition wholly inconsistent with itself, superadded to which, was the other incongruity, of fixing upon the agent a personal liability, for the supposed debt of his legislative principal; the expedient found in the Act of 1894 is a penalty, imposed upon the assured for doing any act within the state, to obtain insurance, in a foreign company, which has not complied with the laws of the state.

It will not be disputed that the state has no power, nor, that it is beyond the legitimate sphere of state government, to compel a foreign corporation to enter its borders for the transaction of business which can be done elsewhere; by imposing a penalty upon any assured within the state of Louisiana for the doing of any act, in order to obtain insurance outside of the state, the Act of 1896, if maintained, would compel foreign companies, either to establish local agencies, or cease doing business with the residents of the state of Louisiana.

So far as the state of Louisiana is concerned, the character and *situs* of the contract has been fixed with certainty, by the decision of the Supreme Court in the State *vs.* Williams, 46 La. An., 922; it was there declared to be a contract made in New York, and that its character was such that it did not constitute the doing of business within the state of Louisiana.

From the agreed statement of facts, it is shown, that the

contract evidenced by the open policy was made in New York; that the premiums due by the assured, and the losses, if any, payable by the underwriter, were there discharged; the two facts by which, under the theory of the state, defendants have incurred the penalty of the Act of 1894, and the conditions deemed to sustain that law, are, that the property covered by the contract is situated within the state of Louisiana, and the mailing at New Orleans, of the letter of advice of shipment, required by the policy. By this latter, the state claims that defendants have done, in the sense of the statute of 1894, an act within the state of Louisiana, to effect for themselves insurance in a foreign company which has not complied with the laws of the state.

The various grounds covered by the assignment of errors, it is apprehended, can be more conveniently argued and understood in their application, by their discussion as they are logically related, than if dealt with separately, and in the order in which they are found in the record.

The principal ground of attack upon the statute of 1894, relied upon by plaintiff in error, is that it is violative of the 14th Amendment of the Constitution of the United States, in that it deprives them of their liberty and property without due process of law; liberty, in the sense of the amendment, includes more than mere freedom from physical restraint; it includes the right to use and enjoy all the energies, physical and moral, with which man is endowed; the right to use the faculties, to engage in or follow any lawful vocation or business, by which a livelihood may be gained; property imports the idea not only of possessing and enjoying, but of acquiring, and to this end, engaging in business, and making contracts, for the purpose of emolument or gain.

If the Act of 1894, particularly its attempted application in the present case, is a constitutional exercise of the state authority, a party resident in Louisiana would be unable to make a contract of insurance with a foreign underwriter having no agent in the state; by open policy, covering

property within the state of Louisiana, since, under the statute, it would be a penal offense for him to perform within the state an act, without which the contract would not be susceptible of execution; the question, therefore is, whether property situated in Louisiana can be protected by an open marine policy issued by a foreign corporation, having no agent within the state of Louisiana; the letter of advice of shipment, which is the usual and ordinary incident of a contract by open policy, is necessarily a feature of such a contract, and if such letter cannot be lawfully mailed in the state of Louisiana, it is evident that contracts of the character in question cannot be made in that state.

It will, of course, not be questioned, that laws of the state can have no operation upon persons or contracts made outside of its territory; we are not here concerned with the case where the state is asked to recognize or enforce a foreign contract, which it conceives to be injurious to its own interests or to those of its citizens; the state of Louisiana is asked to extend no comity as to a contract made in another state, which is contrary to good morals, or to its own public policy.

The right of the parties to make a contract in New York is beyond question, but this right would be of no value, if so small an act as mailing a letter in the city of New Orleans can be made the subject of a penalty, and thus defeat the lawful intention of the parties; it has been held, that a contract, lawful in the state where it is made and to be executed, is not in any manner affected by the prohibitory laws of another State, from which the final assent is communicated by mail.

In McIntyre *vs.* Parks, 3 Metcalf, (Mass.), p. 207, a promissory note was given for the price of lottery tickets sold in New York, the laws of which state permitted such transaction; the tickets were bought by the maker of the note for resale in Massachusetts, to the knowledge of the vendor, the laws of which state prohibited the sale of lottery tickets; the

whole transaction was before the court, and its validity contested on the ground that the consideration was illegal under the laws of Massachusetts; it was claimed that the proposal to buy the tickets was *made by letter dated and mailed at Boston;* this fact, however, in the opinion of the court, had no effect upon the validity of the contract made in New York, in which state the tickets were delivered.

In Milliken *vs.* Pratt, 125 Massachusetts, p. 374, plaintiff was engaged in business in Maine. Defendant was a married woman residing in Massachusetts. The two entered into a contract, which was legal in the state of Maine, but invalid in Massachusetts. The contract, which was in writing, was drawn up and signed in Massachusetts and transmitted through the post-office to the plaintiff in Maine. The contract being sued on in Massachusetts, the liability thereunder was denied on the ground of its illegality under the laws of that state. The court said, p. 376:

"If the contract is completed in another state, it makes no difference in principle whether the citizen of this state goes in person, or sends an agent, or writes a letter across the boundary line between the two states. As was said by Lord Lyndhurst: 'If I, residing in England, send an agent down to Scotland, and he makes contracts for me there, it is the same as if I, myself, went there and made them.' Pattison *vs.* Mills, 1st Dow, C. L., pp. 342, 363; so, if a person residing in this state, sends or transmits, either by messenger or by the post-office, to a person in another state, a written contract, which requires no special forms or solemnities in its execution, and no signature of the person to whom it is addressed, and is assented to and acted upon by him, the contract is made there, just as if the writer personally took the executed contract into the other state, or wrote or signed it there, and it is no objection to the maintenance of an action thereunder here, that such contract is prohibited by the law of this commonwealth."

If by the law of New York, the contract of insurance in question is valid, there can be no doubt that a suit to enforce its liability would be allowed by the laws of Louisiana. If the statute of 1894 could be fairly considered as furnishing any obstacle to the enforcement of such a contract, based upon the making of the report of shipment, it is clear that the latter *does not effect* the insurance and for that reason alone, the statute would find no application.

The court will keep in view the act, as to which a penalty is provided by the law; it is:

"Any act in this state to effect for himself, or for another, insurance on property then within this state."

So far as the status of any contract can be fixed by judicial decision, the policy of the Atlantic Mutual Insurance Company has been determined by the decision of the state Supreme Court in the State *vs.* Williams, 46 An., p. 922. That court has declared in unmistakable terms, that it is the original contract of insurance, made and executed in New York, which establishes the contract relation between the parties, and by which the insurance is effected; that the subordinate policies of insurance, and necessarily the letters of advice contemplated by the open policy, do not effect the insurance; that they introduce no element into the transaction which is not fully supplied by the open policy; that in that policy are found all the conditions for each separate shipment and insurance of cotton which it covers; that in the separate contracts of shipment also, there is no agreement or condition that is not found in the open policy; that the contract of the defendant is a New York contract, and cannot be impaired or annulled as to any part, by the laws of the state of Louisiana. If valid in New York, it cannot be made invalid by the prohibitory laws of Louisiana.

In Lamb *vs.* Bowser, 7 Bissell, p. 315, an insurance company was domiciled in Illinois; the defendant delivered to the agent of the company in Indiana, where the defend-

ant resided, an application for insurance on certain property in that state, a note and a sum of money representing the premium on the policy; the agent forwarded the application, the note and sum of money, to the company's place of business in Illinois, and caused a policy of insurance to be delivered to the defendant in Indiana, all of which was done by the company and the agent without having first complied with the statute of Indiana respecting foreign coporations and their agents doing business in that state; the premium note not being paid, suit was brought against the maker in Indiana; it was defended on the ground that the contract was unlawful under the Indiana statute providing penalties against any person who should receive or transmit money, or should in any manner make, or cause to be made, any contract, or transact any business for, or on account of, a foreign corporation which had not complied with the state laws. The court declared (p. 318) that the case stood just as if the defendant had procured his insurance on a personal application to the company in Illinois; the defendant insisted, however, that if the contract was to be regarded as an Illinois contract, it was entered into in Indiana in violation of its statute, and therefore could not be enforced in that State. In answer to this the court said, that it might be sufficient to say that *it was not competent for the legislature of Indiana to declare, that the citizens of that state should not be allowed to make such contracts as they pleased, outside of the state, for insurance on their property, whether it was within or without the state;* that it by no means followed that because corporations have no existence beyond the boundaries of the sovereignty or state which created them, and Indiana had said that foreign corporations should be admitted to do business in that state only on certain terms, which were not complied with in the particular case, that the contract was void; that it was clearly not the intent of the legislature to apply the statute to the contracts entered into with foreign corporations out of the state; that the

class of contracts denounced by the statute were those made *within* the state, while that in question was entered into in Illinois; therefore, that it contravened no public policy of the State, to enforce by its courts a contract made in another state, the law only applying to contracts made within its territory.

The Act of 1894 having manifestly for its object, the enforcement of Article 243 of the Constitution, which fixes the conditions upon which foreign corporations may engage in business in this state, it should be limited to the purpose of its enactment. It could have no reference to the corporation of another state, which has not carried on, or attempted to carry on, any business within the state. The Atlantic Mutual Insurance Company has not entered the state of Louisiana through any of its officers or agents, to do business. It is not engaged in business there. All the business it does, is done in New York. This is not only shown by the decisions of other courts, but also by the opinion of the state Supreme Court in the Williams case.

It must be admitted that the mailing of the letter of advice, or report of shipment, is a mere mode of communication; such communication might be had as well by the assured going personally to New York, or by his sending an agent, or by his use of the telegraph to transmit a message. If mailing the letter or report in the post-office is an act within the statute, so likewise would the departure of the assured on a train or steamship, or his dispatching a messenger, or his transmitting a telegram, be such an act. The fact that communication was had by letter is a circumstance altogether accidental in its character, and merely a mode by which communication, which could have been had by other means as well, was obtained.

Suppose that the state should have ordained that boarding a train or vessel, for the purpose of going to New York to effect insurance, was an act punishable by its statute, or that the sending of a person to New York for this purpose,

or that to write out or forward a telegram for the same purpose, were acts punishable by its laws, how would such legislation stand before this court?

It is more than obvious, that if the Act of 1894 be allowed to have effect, with regard to contracts of insurance such as that in question, it would be impossible for a party within the state of Louisiana, to hold any communication with an insurance company located in another state, which had not complied with the laws of the former. A penalty being provided for such conduct, the whole power of the state stands behind the prohibition and the enforcement of the penalty. The result would be, that with reference to the matter in question, Louisiana becomes isolated from the rest of the civilized world, and its inhabitants debarred intercourse with a certain class of those with whom they stand in contract relations, beyond the territory of the state. Under such conditions, in what sense can a resident of Louisiana be considered as in the enjoyment of his liberty? What becomes of the guarantees of the Federal Constitution that no state shall make or enforce any law which would abridge the privileges or immunities of citizens of the United States, and that no state shall deprive a person of life, property or liberty, without due process of law; nor deny to any person within its jurisdiction, the equal protection of the laws? The right to contract, and freedom as to the places at which, and the persons with whom contract relations may be established, is an essential part of the liberty which is guaranteed by the fourteenth amendment.

Howard *vs.* Pennsylvania, 127 U. S., pp. 678, 684.

The right to make a contract in another state carries with it all that is necessary, appropriate or useful in the performance thereof. To concede to defendants the authority to make a contract in New York, but forbid them doing any act, however insignificant, in Louisiana, in compliance with

such contract, is tantamount to a prohibition against the entering into such a contract in New York. Under the Federal Constitution defendants have a clear right to enter into contract relations with any person in New York, and to freely use the mails and the telegraph for the purpose of communicating with the one with whom they have contracted. If it is within the power of Louisiana to say, "Although you have in New York, entered into a contract which was there valid, and which you had a right to make, I forbid you from holding any communication with reference to such contract from within the state of Louisiana," it would be the same thing as though the state had, in so many words, prohibited, under such conditions, any one within its territory from entering into contract relations with any person in another state.

Butchers' Union Co. *vs.* Crescent City Co., 111 U. S., pp. 746–757.

In the present case, the defendants are denied the right of doing in the state of Louisiana so innocent an act as the mailing of a letter to a party in New York, with whom they have made contract. It is difficult to conceive of a more naked, unauthorized invasion of liberty.

The statute of 1894 makes penal an act which may be done with impunity with reference to an insurance company, represented in Louisiana by an agent. In case the company has no agent, the identical act, unnoticed in the former case, comes within the penal law. In what sense can parties situated as are defendants be said to enjoy equal protection of the laws? The right to engage in a certain line of business is permitted to part of one class of persons, while denied to another, engaged in the same business, and such denial is based not upon any act or conduct of those falling under the ban, but upon the circumstance that an underwriter in another state, with whom they desire to have business relations, has not chosen to appoint an agent in

the state of Louisiana. The amenability of any person to the law should depend upon his own act, and not upon that of another. A party having the free right to contract in any part of the world, finds that he is prohibited from so doing by the act of a foreign corporation, with whom he desires to contract. What protection under the law is enjoyed by such a prohibited person?

While in a general sense, a policy of insurance is not an instrument of commerce, the one under consideration is such, by its conditions and surroundings; defendants are in the buying of cotton, which they resell to purchasers in the eastern or middle states and in various ports of Great Britain and on the continent of Europe; the custom observed by all persons engaged in this business in the city of New Orleans, is, on the sale of the cotton, to draw a bill of exchange on the purchaser for the price, attaching to the exchange the bill of lading covering the cotton; it is a part of the business to negotiate all exchange in the city of New York, though sometimes it is forwarded directly to the purchaser for collection for account of the seller; the exchange in New York is not negotiable, unless both draft and bill of lading are accompanied by an order on the insurance company, for insurance protecting the cotton; the purchaser is not bound to pay the draft drawn for the price of the cotton unless there comes with it, and with the bill of lading, a policy of the insurance company covering the shipment: such policy, as well as the order for insurance, which arrives with the draft and the bill of lading in New York, are all based upon the original contract of insurance by open policy. The bill of exchange is secured, first by the bill of lading, the property covered by which is protected by the contract of insurance. The evidence shows that the conduct of defendants' business is impossible without the use of all three of the instruments, that is, the exchange, the bill of lading and the contract of insurance. The bill of lading is unquestionably an instrument of com-

merce, and evidence of a commercial transaction. In case of the loss of the cotton from dangers or risks within the policy, the bill of lading alone then represents nothing in the nature of property, save in certain cases a claim against the carrier. The insurance is designed to supply the property in case of loss, by indemnity to be paid by the underwriter. It is thus seen that the part played by the policy of insurance, constitutes commerce to the same extent, as does the bill of lading. The purpose of the policy of insurance is to furnish a substitute for the bill of lading, in the event that the property covered by it is damaged or destroyed, by reason of a cause within the policy. Whatever purpose may be served by the bill of lading, is equally performed by the contract of insurance, when it comes into play. The policy is an important and essential factor in the buying and selling of cotton for shipment to other states and to foreign countries, and is used in the city of New Orleans by all cotton-buyers, as well as by defendants.

The authorities relied upon by defendant in error do not in any respect sustain its position.

The case of Hooper *vs.* California, 155 U. S., p. 648, cited by plaintiff, contributes nothing to the solution of the present case. The statute of California made it a misdemeanor for any person in that state to procure insurance for any resident thereof, from an insurance company not incorporated under its laws, and which had not filed the bond required of foreign insurance companies. The defendant had undoubtedly violated the statute, which prohibited any person from procuring, or agreeing to procure, insurance for a resident of the state, from any insurance company not incorporated under the laws of the state, unless the latter, or its agent, had filed the bond required by law relative to such companies. The facts were these: Johnson & Higgins were insurance brokers in New York. Their business was to procure insurance for other persons, of whatever state resident, on the request of such persons. Upon receipt of

the policies they were delivered to the persons for whom they were procured. Johnson & Higgins had a branch of their business in the state of California, conducted by Hooper, their agent. Mott, a resident of California, applied in California to Hooper, also such resident, for insurance, to be obtained from his principals, Johnson & Higgins. This he did. The policy was received by Hooper, and by him delivered to Mott, in San Francisco, where also the premium was to be paid. In that case, the conduct of Hooper was in direct violation of the statute, which prohibited all persons within the state from procuring insurance for a resident thereof, in any company which had not complied with the law. The case only affirms the principle intimated by the state Supreme Court in the Williams case, that the status and capacity of all persons and all acts or contracts founded or done *within the limits of the state* are subject to its laws. Hooper was a resident of California, and in violation of its statute, procured for Mott, also a resident, and delivered to him in California, a policy of insurance in a company which had not complied with the conditions fixed by law under which it could do business in the state. The entire transaction began and ended in the state. The policy was procured by Hooper, it was delivered by him, and the premiums were received by him, all within the state of California; the company in question was doing business through an agent within the territory of California in violation of its laws. What was forbidden was the procuring within the state of contracts outside the state; it was the obtaining within the state of California, of contracts outside of the state, *and not such contracts themselves*, which was prohibited; the procuring of the contract was not forbidden, except when done within the state. Here, however, the case is entirely different, the entire transaction was consummated in New York, the policy being issued there, the premiums, and losses, if any, being paid there; the mailing of the report of shipment did

not procure or effect the insurance—that was already consummated by the open policy. The Hooper case declares simply that the Fourteenth amendment of the Federal Constitution does not guarantee a citizen the right to make within his own state, either directly or indirectly, a contract, the making whereof is constitutionally forbidden, but it does not declare that the resident of the state cannot make in another state a contract which is forbidden by the laws of his own state.

The case of Pierce *vs.* People, 106 Ill., p. 11, is likewise no authority as to the present controversy; a statute of Illinois provided a penalty against the agent of a foreign insurance company, for acting for such company without a certificate of authority from the auditor, showing that it had complied with the conditions required by the state law for its doing business; it was claimed that the agent procured and delivered a policy in Illinois to a resident of that state; that the premium was paid to the agent in Illinois; attempt to evade the law was by claiming that the party procuring the insurance should be considered as the agent of the assured; the court, very properly, brushed away this contention, as being a subterfuge; the purpose of the Illinois statute was to prevent altogether within its borders the making of contracts by its citizens, with foreign insurance companies which had not complied with its laws, but it must be observed that the statute went no further than to punish parties to such contracts, as were made within the state; the act of the contracting agent which was punished, was that done in Illinois, and although the intention of the law-maker was to prevent any contract being made with any such concern by its citizens anywhere, its preventive measures were confined to contracts made within its limits, and to such acts as were properly parts and parcels of the prohibited contract; there was no effort to fix a penalty for anything done within the state, as an incident of a contract already entered into elsewhere; there was in view only such acts or

conduct as were in preparation of effecting the insurance which was forbidden. This was in aid of the object of the law, which was to do away with such contracts entirely. The opinion in the case is taken up almost entirely with combating the proposition, that the culprit was not the agent of the assured, the status attempted to be given him by the company. He was, in fact, the agent of the latter, notwithstanding the pretense to the contrary.

In Commonwealth *vs.* Biddle, 139 Penn. State, p. 609, (21st Atlantic Reporter, p. 134), the statute provided that any person or persons, or any agent, officer or member of any corporation, paying, receiving or forwarding any premiums, applications for insurance, or in any manner securing, helping or aiding in the placing of any insurance, etc., in an insurance company not of the state of Pennsylvania, which had not been authorized to do business in it, should be guilty of a misdemeanor; the decision of the court simply was that the statute had no application to a party procuring insurance on his own property in such an unauthorized company. So far from furnishing any authority against defendant, this case tends to support the propositions upon which this suit is defended. The opening sentence of the opinion is this:

"It may be readily conceded that an act which should attempt to prevent a non-resident owner of property within this state, *or a resident owner, not at the time within its territory*, from insuring his property in any manner, lawful in the place of contract, would be void, as extra-territorial; so also it may be said if a citizen of Pennsylvania has by contract, validly made out of its boundaries, incurred a liability, no law of this state, nor the Constitution of the United States, can prevent his fulfilling that obligation by an act done within the state."

That part of the opinion last quoted announces the very proposition upon which the defense in the present case in

great part depends, which is, namely, that the contract of the defendant being validly made outside of Louisiana, he can suffer no penalty prescribed by the laws of that state in fulfillment of such a contract, by any act done within its limits; the open policy being made in New York, there is no power in the state of Louisiana to prohibit the defendant from complying with any part of his contract by an act done within its borders. If under the Federal Constitution defendant was entitled to make in New York the contract in question, the right to make such a contract carried with it the right to mail a letter in Louisiana, if the contract required that this should be done.

In Slaughter *vs.* Commonwealth, 13 Grattan, p. 767, the statute provided that no agent of any insurance company, incorporated or authorized by another state, should transact business of the agency within the state of Virginia without a license; such a case presents no question at all decisive of the present controversy, the law and the facts being entirely dissimilar; the case simply declares that a foreign corporation could not pursue any business within the state, except upon conditions prescribed by the latter; this is not disputed.

The post-office and mails being established by the Federal Government, the transmission of letters is one of the means by which the General Government discharges its most important functions, the right to establish post-offices and post-roads being given by the Constitution itself. If the state of Louisiana has the right to say to a party, "You shall not use the mails for a certain designated purpose, without incurring a penalty under my laws," such a prohibition could be extended to all purposes, and thus defeat one of the powers of Congress. The conditions upon which the mails can be employed can be fixed by the Federal Government alone; they cannot be abated or enlarged by any state.

It is apparent that if defendants can be deprived of the use of the mails with reference to their contract with the in-

surance company, they could also be deprived of communication in any other mode, save by becoming amenable to a penalty fixed by the state law. By this means they could be prevented from holding any communication in any manner with a company located in another state which had not complied with its laws. They could be prohibited from departing in person for the purpose; they could be punished for sending a messenger to transact the business for them; the sending of a telegram for such a purpose could be made a misdemeanor. All these acts would be done within the state of Louisiana, and consequently punished by the act of 1894, if it be permitted to stand. See 125 Mass., 374.

It is true that it has been declared in a series of decisions by the Supreme Court of the United States, beginning with Paul *vs.* Virginia, 8 Wallace, p. 178, that a policy of insurance being only a contract of indemnity, it is neither commerce nor an instrument of commerce. This militates in no respect against the position of defendants, who are simply asserting their right to communicate with a party with whom they had made a contract in another state; it is this communication which is charged to be an act violating the statute of 1894.

The use of the telegraph to notify the company cannot be distinguished from the use of the mails for the same purpose.

It has been said in Pensacola Telegraph Co. *vs.* Western Union Telegraph Co., 96 U. S., p. 9, that:

"Post-offices and post-roads are established to facilitate the transmission of intelligence. Both commerce and the *postal service* are placed within the power of Congress, because being national in their operation, they should be under the care of the National Government. The powers thus granted are not confined to the instruments of commerce, or to the postal service known, or in use when the

Constitution was adopted, but they keep pace with the progress of the country and adapt themselves to the new developments of time and circumstances. They extend from the horse and its driver to the stage-coach, from the sailing vessel to the steamboat, from the coach and the steamboat to the railroad, and from the railroad to the telegraph, as these new agencies are successively brought into use to meet the demands of increasing population and wealth. As they were intrusted to the General Government for the good of the nation, it is not only the right, but the duty of Congress, to see that intercourse among the states for the transmission of intelligence is not obstructed or unnecessarily encumbered by state legislation. The electric telegraph marks an epoch in the progress of the times. In a little more than a quarter of a century it has changed the habits of business and become one of the necessaries of commerce. It is indispensable as a means of intercommunication, but especially is it so to any commercial transactions.

* * * * * *

"Contracts are made by telegraphic correspondence, cargoes secured and the movements of ships directed. Telegraphic announcement of the markets abroad, regulates the price at home, and the prudent merchant rarely enters upon any important transaction, without using the telegraph freely to secure information."

In the case cited, the state of Florida had undertaken to confer an exclusive right upon the Pensacola Telegraph Company, a Florida corporation, to pursue the telegraph business within certain designated counties; this exclusive right was contested by the Western Union Telegraph Company, and was, mainly upon the grounds set forth, annulled; the principle that the telegraph as a means of communication was beyond the control of the states, and that the latter were in no respect entitled to hamper or interfere with its free use, was recognized and applied in Telegraph Company

vs. Texas, 105 U. S., p. 464; Leloup *vs.* Port of Mobile, 127 U. S., p. 645.

In the latter case it was declared that it was not only the right but the duty of Congress to take care that intercourse among the states by the transmission of intelligence between them be not obstructed or unnecessarily encumbered by state legislation (pp. 645 and 646).

It is respectfully submitted, that the judgment of the Supreme Court of the state of Louisiana should be *reversed*.

BRANCH K. MILLER,
Attorney for Plaintiff in Error.

165-578

Office Supreme Court, U. S.
FILED.
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JAMES H. McKENNEY,
CLERK.

165-578.

THE LAW ASSOCIATION
PHILADELPHIA.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1896.

No. 446.

E. ALLGEYER AND CO., A COMMERCIAL PARTNERSHIP COMPOSED OF CHARLES E. ALLGEYER, ERNEST SIEGFRIED, RENE BLOCK, CHARLES A. MARANDE, AND OLIVIER SERA, PLAINTIFFS IN ERROR,

vs.

THE STATE OF LOUISIANA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

M. J. CUNNINGHAM,
Attorney General of Louisiana.
E. HOWARD McCALEB,
Of Counsel for Defendant in Error.

A. W. HYATT STATIONERY M'F'G CO., LTD., 407 CAMP ST.—74,.112

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THE STATE OF LOUISIANA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

The Constitution of the State of Louisiana provides, Articles 235 and 236, that:

"The exercise of the police power of the State shall never be "abridged, nor so construed as to permit corporations to con- "duct their business in such a manner as to infringe the equal "rights of individuals or the general well-being of the State.

"No foreign corporation shall do any business in this State "without having one or more known places of business, and an "authorized agent or agents in the State, upon whom process "may be served."

Under the provisions of these articles the General Assembly of the State of Louisiana enacted Act 66 of 1894, which reads as follows:

"Be it enacted by the General Assembly of the State of "Louisiana, That any person, firm or corporation who shall fill "up, sign or issue in this State any certificate of insurance un- "der an open marine policy, or who in any manner whatever "does any act in this State to effect for himself or for another "insurance on property, then in this State, in any marine in- "surance company which has not complied with all respects "with the laws of this State, shall be subject to a fine of one "thousand dollars for each offense, which shall be sued for in "any competent court, by the Attorney-General, for the use "and benefit of the Charity Hospitals in New Orleans and "Shreveport."

The plaintiffs in error, assert that this act is in violation of the Constitution of the United States, "in that it deprives them of their property without due process of law, and denied to them the equal protection of the laws; that the business concerning which the penalty was sought to be enforced, and the contract made in reference thereto, were beyond the jurisdiction of the State of Louisiana, and not amenable to any penalties imposed by its laws; that the contracts of insurance were made in the State of New York where the premiums were paid, and where the losses, if any, were also to be paid; that they were New York contracts, and that under the Federal Constitution, the defendants had the right to do and perform any acts in the State of Louisiana, which were necessary and proper for the execution of its contracts made elsewhere, and so far as Act No. 66 of 1894 might be construed so as to prevent or interfere with the execution of such contract, it was violative of the Federal Constitution."

The statement of facts sets forth that the defendants entered into a contract of marine insurance under an open policy with the Atlantic Mutual Insurance Company, indemnifying them in case of loss on shipments of cotton in transit between the ports of New Orleans and elsewhere. This contract (marked Exhibit "A") was entered into at New York city, and contained the stipulation that, "Shipments applicable to this policy to be

"reported to this company by mail or telegraph on day of pur-
"chase." * * * * * * * * "A new and separate policy
"to be issued for each risk, the premium on which is to be paid
"in cash upon the delivery of such policy in New York to E.
"Allgeyer & Co."

"Risks endorsed hereon and subsequently taken off, and
"new and separate policies issued, are not to exhaust this
"policy." * * * * * *

"The said goods and merchandise, hereby insured, are
"valued, including premiums, at the sums expressed in the let-
"ter of advice as provided for herein, not to exceed the invoice
"cost and 15 per cent." * * * *

"In cases of loss prior to issue of certificate or policy and
"negotiations of exchange for purchase of cotton, the liability
"under this insurance is not to exceed the costs of the cotton and
"charges added." * * * * *

"The company are entitled to premium on all shipments re-
"ported as provided for above. The rate of premium shall be
"fixed by the president or vice president of the company, when
"the vessel and nature of the risks are known and understood,
"charges and expenses in currency to be reduced to the standard
"of gold." * * *

"If the voyage aforesaid shall have been begun, and shall
"have terminated before the date of this policy, then there shall
"be no return of premium on account of such termination of the
"voyage."

"In all cases of return of premium, in whole or in part,
"one-half per cent. upon the sum insured, is to be retained by
"assurers."

It is admitted that: "The Atlantic Mutual Insurance Com-
"pany is engaged in the business of marine insurance, has ap-
"pointed no agent in the State of Louisiana, and has not com-
"plied with the conditions required by the laws of this State for
"the doing of business within the same, by insurance companies
"incorporated and domiciled out of the State." (See also Act 76 of the State of Louisiana of 1886.)

On October 3, 1894, Allgeyer shipped one hundred bales of cotton, and at the time of shipment notified the company, under the terms of the policy, by mailing a letter of advice, commonly

called a binder, and at the time of mailing the said binder, the cotton referred to by it, to-wit: one hundred bales, was within the State of Louisiana.

We therefore conclude, that from the terms of the policy and the note of evidence, that Allgeyer & Co., at the time, being in the city of New Orleans, State of Louisiana, affected insurance on cotton in transit from New Orleans to Havre by mailing a binder, and that: "The rate of premium was to have been fixed "by the president or vice president of the insurance company "when the vessel and nature of the risks are known and under-"stood." In other words, the contract was completed within the confines of the State of Louisiana.

It is pretended that this contract was performed outside the territorial limits of Louisiana and beyond its jurisdiction. We think the open policy makes a special provision concerning each risk, because it is written that: "Shipments applicable to this "policy to be reported to this company by mail or telegraph on "day of purchase. The said goods and merchandise hereby "insured are valued, including premiums, at the sums expressed "in the letter of advice, as provided for herein, not to exceed the "invoice cost and fifteen per cent."

Can it be seriously claimed that this contract is consummated and executed outside of the port of New Orleans? The only essential necessary to the completion of the contract, the *aggregatio mentium*, is complied with by the act of mailing and issuing such a binder under the terms of the open policy, and constitutes a provisional insurance on the cotton until the issuance of the new policy in New York, either by defendant's agent or the holder of the bill of exchange.

In our argument in the Supreme Court of Louisiana we said:

Pending this shipment, the communication or telegram is a separate insurance under the open policy, and upon the arrival of the draft or bill of exchange, the purchaser, or defendant's agent, receives a new policy in New York, and the *delivery* of this new policy operates as a ***substitution and cancellation*** of the insurance on

the shipment under the terms of the original open policy and the notice or telegram. It will not be denied that under the general law, there is no insurance upon the cotton until the mailing of of the application or "*binder*" nor will it be denied that until the arrival of the bill of lading this notice or binder *represents the insurance on the cotton in transitu from New Orleans to New York, subject to the terms of the open policy.*

Certainly, upon the delivery of a new policy to the holder of the bill of exchange, the insurance under the open policy *ipso facto* falls, and the insurance on the shipment is entirely covered by this new policy. The premium adjustment is made between Allgeyer and the company, in so far as Allgeyer is concerned, because as he parts with the property his dominion over it ceases, and the new insurance is held by the purchaser of the bill who can do with it as he pleases.

It is serious error to assume that the binder is subject to acceptance or rejection by the Atlantic Mutual Insurance Company, because, in case of loss, under an open marine policy, proof of the mailing of the communication, or binder, is sufficient to obtain payment; it, therefore, logically follows that failure on the part of assured to mail or telegraph his "binder," or communication to the company is such a failure so as to operate a complete bar to recovery. In other words, no insurance is effected without the mailing of said communication. By applying these facts to the Act of 1894, it is plain that the law has been violated by the defendant.

See, also, State vs. Allgeyer, 48 La. An., p. 104.

The "general welfare" clause of the Federal Constitution and of our State Constitution is based upon the maxim: *Salus populi suprema lex.* For the proper enforcement of its police power, a State may enact laws prohibiting a foreign corporation from doing any act within its confines. This right, however, is restricted only in cases where such corporation is engaged in a business necessarily federal in its nature.

Having the power to exclude and prohibit, the right to pass any and all laws to enforce that prohibition by proper legislation is unquestioned.

Bank vs. Earle, 13 Pet. 510;
Insurance Co. vs. French, 18 How. 404;
Society vs. Colte, 6 Wall. 594;
Provident Institution vs. Massachusetts, Id. 611;
Hamilton Company vs. Massachusetts, Id. 632;
Paul vs. Virginia, 8 Wall. 168;
State Tax on Railway Gross Receipts, 15 Wall. 284;
Railroad Co. vs. Peniston, 18 Wall. 5;
Delaware Railroad Tax Case, Id. 206;
State Railroad Tax Cases, 92 U. S. 575;
Philadelphia & S. S. S. Co. vs. Pennsylvania, 122 U. S. 325; 7 Sup. Ct. 1116;
California vs. Southern Pacific R. R. Co., 127 U. S. 1; 8 Sup. Ct. 1073;
Home Ins. Co. vs. New York, 134 U. S. 594; 10 Supt. Ct. 593;
Maine vs. Grand Trunk R. R. Co., 142 U. S. 217; 12 Supt. Ct. 121, 163;
Ashley vs. Ryan, 153 U. S. 445; 14 Supt. Ct. 865;

The Act of 1894 is attacked by defendant on the ground that it deprives it of its property without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States. We fail to perceive the application of this clause to the case at bar

"The statute provided for a trial, for bringing the party before the Court, notifying him of the case he is required to meet, for giving him a hearing, for the deliberation and judgment of the Court, for an appeal to the highest Court, and for a hearing and judgment there." Pearson vs. Yewdall, 95 U. S. 294.

It will, therefore, be conceded that the State derives its right

to exclude foreign corporations by virtue of the police power inherent in it as sovereign. Thus it has been held in Barbier vs. Connolly (113 United States, p. 27), that, "The Fourteenth "Amendment of the Constitution does not impair the police "power of a State."

Mr. Justice Field, in delivering the opinion of the Court, said: "But neither the amendment—broad and comprehensive as it is—nor any other amendment was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education and *good order* of the people and to legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity. * * * In the execution of admitted powers unnecessary proceedings are often required which are cumbersome, dilatory and expensive, yet, if no discrimination against any one be made, and no substantial right be impaired by them, they are not obnoxious to any constitutional objection. The inconveniences arising in the administration of the laws from this cause are matters entirely for the consideration of the State; they can be remedied only by the State."

But the defenses herein presented are not *res nova*. They have been ably disposed of by this Court in the matter of Hooper vs. State of California (155 U. S., p. 648), and further argument on our part would be superfluous. The California statute and the Louisiana statute are identical, save and except that the former imposed a penalty upon the insurance broker, while the latter specially includes the resident owner who insures his property in an unauthorized foreign insurance company.

Thus, it has been held in Commonwealth vs. Biddle, 139 Pa. State, 609, that "beyond the limitations imposed by the Consti-"tution, the power of the Legislature to declare any act done "within the territory of the State, unlawful or criminal, cannot "be questioned; and all considerations of wisdom or policy, of "hardship, of difficulty, or even impossibility of general enforce-"ment, must be addressed to the law making branch of the Gov-"ernment.

"We entertain, therefore, no doubt of the power of the "Legis ature to make the insurance of his property in an un- "authorized foreign company by an owner criminal, if done in "this State." See also State of Louisiana vs. Williams, 46 An. 922; 13 Gratt. (Va.), 767; 3 S. Rep. 140; 106 Ill. 11; Supreme Court Reporter, Vol. 15, p. 207; State vs. Allgeyer, 48 An. 104.

And this Court has further declared in the case of Hooper vs. State of California, *ibid*, that the "Fourteenth Amendment does not guarantee to a citizen the right to contract by himself, or his agents, within his State in violation of its laws."

We, therefore, respectfully submit that the judgment of the Supreme Court of the State of Louisiana should be affirmed.

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